INDEX.

	PAGE
Opinions below	1
Jurisdiction of the court	1
Statement of the case	2
Points upon which petitioner intends to rely	8
Summary of the argument	9
Argument	11
POINT I. Sections 1, 2 and 3 of the ordinance in question are repugnant to the Fourteenth Amendment of the Constitution of the United States because they take petitioner's property without due process of law	11
(*a*) The ordinance takes the property of the railroad company within the meaning of the constitution	11
(*b*) The property of a railroad company cannot be taken or appropriated, under the guise of regulation, except for a purpose within the statutory duties of the carrier	12

PAGE

(*c*) Taxicab service is no part of the business of petitioner and it cannot be compelled to furnish land for a public hackstand under the guise of an exercise of the police power... 14

(*d*) The ordinance cannot be upheld as securing the performance of a legal duty owing by the railroad company to its passengers—in other words, as a regulation of transportation.. 23

POINT II. The contract of 1912 did not operate to grant to or confer upon the municipality the right to exclude the petitioner from the use of its own land and to establish thereon a public hackstand against its express objection 26

CONCLUSION 38

CASES CITED.

	PAGES
Banton *v.* Belt Line Ry. Corp., 268 U. S. 413	22
Donovan *v.* Pennsylvania Co., 199 U. S. 279	15, 17, 21
Dummer *v.* Board of Selectmen, 20 N. J. Law, 86	33
Ex parte Vance, 62 S. W. 568	23
Folkstone Corp. *v.* Brockman (1914), A. C. 338 (English)	30
Great Northern Ry. Co. *v.* Cahill, 253 U. S. 71	13, 14
Great Northern Ry. Co. *v.* Minnesota, 238 U. S. 340	11, 12, 14
Irwin *v.* Dixion, 9 How 10	30
McKey *v.* Hyde Park, 134 U. S. 84	30
Munn *v.* Illinois, 94 U. S. 113	20, 21
Pennsylvania Coal Co. *v.* Mahon, 260 U. S. 393	11, 22
Pennsylvania R. R. Co. *v.* Ayres, 50 N. J. Law, 660	30
Producers Transportation Co. *v.* Railroad Commission, 251 U. S. 228	20
Pumpelly *v.* Green Bay Co., 13 Wall. 166	11
Thompson's Express Co. *v.* Mount, 91 N. J. Eq. 497	17, 38
Trustees of the Methodist Church *v.* Hoboken, 33 N. J. Law, 13	33
Tweddell *v.* South Orange, 112 Atlantic 511	33
Union Dry Goods Co. *v.* Georgia Public Service Corporation, 248 U. S. 372	20
United States Pipe Line Co. *v.* D. L. & W. R. R. Co., 62 N. J. Law, 254	3, 27

PAGES

Vagaszki *v.* Coal Co., 225 Federal 913..... 23
Vance, *Ex parte*, 62 S. W. 568..... 23
Van Duyne *v.* Knox Hat Manufacturing Co., 71 N. J. Eq. 375..... 33
Welsh *v.* Morristown, 98 N. J. Law, 630.....19, 24, 32
Wolff *v.* Court of Industrial Relations, 262 U. S. 522 20
Wood *v.* Hurd, 34 N. J. Law, 87..... 30

STATUTES CITED.

Act of February 13, 1925 (U. S.), 43 Statutes at Large, 936, 938..... 8
Judicial Code (U. S.), Section 240..... 1, 8
New Jersey Laws of 1869, Chapter XXIII 3
New Jersey Laws of 1911, Chapter 195..... 23
U. S. Code, Title 28, Chapter 9, Section 347..... 1

IN THE

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner,

vs.

THE TOWN OF MORRISTOWN, HENRY LADEN and OTHERS,
Respondents.

October Term 1927.
No. 147.

BRIEF FOR PETITIONER.

This cause comes before this Court upon Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit granted January 10, 1927.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 14 Fed. (2d) 257; that of the District Court is unreported, but appears at pages 47-55 of the Record.

Jurisdiction of the Court.

This Court has jurisdiction of the above entitled cause under United States Code, Title 28, Chapter 9, Section 347 (former Judicial Code § 240).

The judgment to be reviewed is dated March 26, 1926 (R. p. 374). It reversed the judgment of the District Court, District of New Jersey, and thereby sustained a municipal ordinance establishing a hackstand on petitioner's land and prohibiting the use of other parts thereof by private cars and taxicabs.

The grounds on which the jurisdiction of this Court is invoked are that the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, and decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

Statement of the Case.

The action was begun on October 30, 1924, in the District Court of the United States for the District of New Jersey by The Delaware, Lackawanna and Western Railroad Company, a railroad corporation of the Commonwealth of Pennsylvania and a common carrier of passengers, against the Town of Morristown, a municipal corporation of the State of New Jersey, and sixteen individual defendants, licensed taxicab owners and drivers of the town. The relief sought was a decree enjoining the Town of Morristown from enforcing a municipal ordinance which established a public hack stand on the complainant's station grounds at Morristown, New Jersey, and prohibited the use of other parts of the station grounds by private cars or taxicabs (R. p. 29), and enjoining the individual defendants from entering upon and using complainant's station grounds as a public hack stand.

Petitioner operates as lessee in perpetuity the railroad of The Morris and Essex Railroad Company. The lessor company owns in fee simple and the petitioner as lessee occupies and uses as a common carrier of passengers the passenger station and station grounds at Morristown, New Jersey, hereinbefore mentioned (R. pp. 358-359). The petitioner's lease was validated by an Act of the Legislature of the State of New Jersey, passed in 1869 (P. L. of N. J., p. 28). By force of this lease and the validating act, the title of The Morris and Essex Railroad Company to the premises in question became vested in the petitioner (See *United States Pipe Line Co.* v. *D. L. & W. R. R. Co.*, 62 N. J. L. 254, at p. 261). It has not at any time dedicated these station grounds to public use (Brief opposing petition, p. 8) or conveyed any interest therein to the defendant municipality. Nor has the town condemned any part of the station grounds or any right therein (R. p. 68).

In the year 1922 from 20 to 25 of the licensed taxicab drivers of the town customarily drove into the station grounds in the evening to meet passengers coming from New York (R. p. 127). Competition between these men created conditions of noise and turmoil which the railroad company attempted to eliminate by granting an exclusive privilege of parking taxicabs and soliciting patronage on its premises to a single operator, Welsh, under regulations prescribed by the railroad company (R. p. 22). The municipal authorities declared that petitioner's action tended to create an objectionable monopoly, that it was unjust to the public cabmen and deprived them of their livelihood (R. pp. 114, 135) and that it was an interference

with the town in the management of the taxicab business within its limits and "an insult to the intelligence" of the Mayor and Aldermen (R. pp. 105 and 113). Thereafter, when, upon suit of petitioner, the New Jersey Chancery Court enjoined the respondent taxicabmen from coming upon petitioner's premises for the solicitation of business, the town authorities deliberately established a public taxicab stand "up traffic" from the post petitioner had allotted to its contractor (R. p. 166)—that is, in such a position that to approach the loading point at petitioner's station the public hackmen were compelled to meet the outgoing cabs of petitioner's contractor "head on". This, of course, produced confusion at the loading point (R. p. 199). Having produced this confusion the town then passed an ordinance *in form* prohibiting *all* taxicabmen from parking on petitioner's grounds (R. pp. 344-5-6) but under the circumstances *in fact* prohibiting *only petitioner's contractor,* since only he was then privileged to come upon the station property. The injunction in the New Jersey Chancery Court against respondent taxicabmen was then dissolved (R. 167, 168) as no longer needed to prevent the respondents from coming upon petitioner's property. Welsh, the petitioner's contractor, then challenged the ordinance prohibiting his performing his contract with petitioner, but was unsuccessful. Encouraged by this the town by the ordinance in question in the instant case then put the respondent taxicabmen *back where they originally were* before petitioner sought to end the noise and turmoil resulting from their boisterous competition for fares and, obviously only *to give color of good faith* to the whole series

of ordinances, at the same time forbade the use of other portions of the station property for the parking of the private cars of petitioner's patrons as well as for the parking of vehicles carrying passengers for hire. The text of the pertinent portions of the ordinance follows:

> *Section 1.* That part of the westerly side of the driveway on the east side of the shelter house of the Delaware, Lackawanna and Western Railroad in Morristown, extending from the northerly side of the entrance way to the shelterhouse or tunnel under the depot northerly along the curb to the turn of said driveway under the railroad, is hereby designated and established as an additional public hack stand.
>
> *Section 2.* No automobile or other vehicle either private or that which may be engaged in the transportation of passengers for hire, shall be parked or allowed to stand for a longer period than is necessary to take on or let off passengers, expressage or baggage on that part of said westerly side of said driveway extending from the said northerly side of said entrance way southerly to Lackawanna Place.
>
> *Section 3.* No automobile or other vehicle which may be engaged in the transportation of passengers for hire shall be parked or allowed to stand along the curb or enclosed part of the easterly side of said driveway (R. pp. 28, 29).

Purporting to act upon the authority of this ordinance, 16 or more taxicab owners and drivers entered the petitioner's station grounds and parked their cabs in the area specified in the ordinance, stood upon an adjacent platform and solicited the patronage of persons who had arrived on

petitioner's trains and were walking toward the nearest public highway (R. p. 137). Thereupon petitioner filed its bill in the District Court, alleging the invalidity of the ordinance as a taking of the railroad company's property for municipal purposes without compensation, and depriving the petitioner of its property, and the use and control thereof without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution (R. p. 4). The defense (R. pp. 34, 40) was, first, that the railroad company held its station grounds subject to regulation by municipal authority, and the convenience of the traveling public in having a public hack stand on the railroad's premises was a sufficient ground for the exercise of the municipal power; and secondly, that the ordinance constituted a mere traffic regulation which the municipality had a right to enact and enforce by reason of a contract entered into between the railroad company and the town in the year 1912. That contract (R. p. 308), which dealt primarily with the subject of eliminating grade crossings, contained certain provisions relating to the construction of a new passenger station and approaches thereto. One of these provisions (R. p. 316) was to the effect that the railroad company would provide and construct an L-shaped driveway running through its station grounds from a public street called Morris Street to another street called Lackawanna Place (See map—R. p. 21) and would keep such new street open to traffic to and from the station grounds. After describing said driveway the contract provided (R. p. 316):

> "This contract shall not be construed as a dedication of said driveway as a public highway."

The contract also provided (R. p. 317) as follows:

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

The District Court, after hearing, sustained the bill and on the 17th day of July, 1925, a decree was entered granting the prayers of the bill (R. p. 56) enjoining the town from establishing a hack stand and enjoining the individual defendants from using complainant's land for such purpose. The opinion of Bodine, *J.* of the District Court, is printed on page 47 of the Record. On appeal by the respondents to the Circuit Court of Appeals for the Third Circuit that Court on March 26, 1926, filed its decree reversing the judgment of the District Court and directing the dismissal of the bill of complaint (R. p. 374). Judge Davis, with whom Judge Woolley concurred, wrote the opinion (R. p. 365). Judge Buffington filed a dissenting opinion (R. p. 372).

The majority held that the lands of the railroad company, while private property, had nevertheless, being railroad property, been devoted to a public use and had become so "affected with a public interest" that a municipality could lawfully establish a public hack stand thereon as a matter of public convenience and in the interest of public welfare; that notwithstanding the agreement between the town and the railroad company that said driveway should not be

deemed a public way, the covenant that the driveway should be kept open at all times for passengers, pedestrians and general vehicular traffic to and from the station grounds, and the covenant authorizing the town to exercise all necessary police power at the station for the regulation of traffic "and the enforcement of the rules and regulations of the railroad company with respect thereto" gave the municipality plenary authority to establish a public hack stand in the station yard even against the expressed objection of the railroad company.

Petitioner immediately filed a motion for a rehearing in said cause (R. p. 375), which was denied without memorandum on September 3, 1926 (R. p. 392). Thereupon petitioner applied to this Court under Section 240 Judicial Code as amended by the Act of February 13, 1925, for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals, which application was granted on January 10, 1927.

Points Upon which Petitioner Intends to Rely.

Petitioner urges that the Circuit Court of Appeals erred in reversing the judgment of the District Court and dismissing petitioner's bill, thereby in effect sustaining the municipal ordinance, because:

1. Section 1 of the municipal ordinance of October 22, 1924, declaring part of petitioner's property a public hackstand, and Section 2 of the same ordinance, forbidding private vehicles and taxicabs from parking

on petitioner's property longer than a limited time, and Section 3 of the same ordinance, forbidding the use of part of petitioner's property for parking space for private vehicles and taxicabs, take petitioner's property without due process of law in violation of the Fourteenth Amendment.

2. The contract of 1912 did not operate to grant to or confer upon the municipality the right to exclude the petitioner from the use of its own land and to establish thereon a public hackstand against its express objection.

Summary of the Argument.

All three sections of the ordinance here in question, if enforced, would take the petitioner's property within the meaning of the Fourteenth Amendment and, if without due process, would be unconstitutional. A railroad's property is private property and entitled to exactly the same protection under the Constitution as the property of any other private owner. Aside from those takings to which all private property is subject under the police power, no taking of railroad property can be justified unless for the meeting of some public need which the railroad, as a common carrier, has undertaken to meet. Under the decisions of this Court and under the local law of New Jersey, the furnishing of a public hack stand is no part of the railroad's public duty as a common carrier. As the ordinance would be unconstitutional as applied to the property of an individual and as the burden imposed is not within the scope of

the petitioner's public duty as a common carrier, the ordinance deprives the petitioner of its property without due process of law.

The only sense in which petitioner's property is devoted to public use is that it is devoted to the railroad business. As so devoted it is open only to the business visitors of the petitioner and not to the public generally. The railroad has never dedicated the property here in question to public use and has never granted to the Town of Morristown any interest in the property. Neither has the railroad granted to the town in gross the power to regulate the use of its station property or to appropriate a part thereof to the use of third parties with whom the petitioner has no business.

The ordinance here involved being an attempt to regulate the use of railroad property, the town is without jurisdiction in the premises under the law of New Jersey, which by express statute confers exclusive jurisdiction in the premises upon the State Board of Public Utility Commissioners.

ARGUMENT.

POINT I.

Sections 1, 2 and 3 of the ordinance in question are repugnant to the Fourteenth Amendment of the Constitution of the United States because they take petitioner's property without due process of law.

(a) The ordinance takes the property of the railroad company within the meaning of the constitution.

It is not necessary, in order to render the ordinance vulnerable to constitutional attack, that it must in terms or effect authorize an absolute conversion of property, so long as it affects the free use and enjoyment of the property or the power of disposition at the will of the owner.

Pumpelly v. *Green Bay Co.*, 13 Wall. 166;
Penna Coal Co. v. *Mahon*, 260 U. S. 393, 413.

In *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340, 345, Mr. Justice McReynolds, in speaking of an order of a state commission directing a common carrier to install cattle scales, said: "Manifestly if the order to install is complied with plaintiff's property will be taken."

So in the case at hand, while the municipality has not in terms deprived petitioner of the title to its lands in establishing the hack stand thereon and in prohibiting the use of other parts of its property for parking space for private vehicles and taxi cabs, it has deprived petitioner of

the right to use the land according to its own plans, purposes and requirements.

It has not condemned the property affected, nor has it provided any compensation to the owner.

(b) The property of a railroad company cannot be taken or appropriated, under the guise of regulation, except for a purpose within the statutory duties of the carrier.

In *Great Northern Railway Company* v. *Minnesota*, 238 U. S. 340, the police power of the State to regulate common carriers was invoked as a justification for an order directing the railroad company to install a scale for the use of stock buyers. In that case Mr. Justice McReynolds wrote (p. 345):

> "Manifestly, if the order is enforced, plaintiff-in-error's property will be taken. Whether this would be without due process of law depends upon the special circumstances.
>
> * * * A taking of railroad property under administrative regulation must 'be tested by considering whether * * * the taking was justified by the *public necessities which the carrier could lawfully be compelled to meet*'.
>
> *The business of a railroad is transportation, and to supply the public with conveniences not connected therewith is no part of its ordinary duty.* The obvious purpose of the challenged order was to enforce installation at Bertha of a scale like those at Eagle Bend and Hewitt * * *. * * * we think this was an arbitrary and unreasonable exercise of power. * * * *The demands which may be made upon a carrier are limited by its duty*, and the present record

shows that the required structure has no direct relation thereto.

* * * *A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs*" (Citing *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279). (Italics ours.)

Again in *Great Northern Ry. Co.* v. *Cahill*, 253 U. S. 71, 72, Chief Justice White paraphrased the foregoing opinion in the following language:

"Coming to consider the contention of the railway that the order to put in the scales was repugnant to the Fourteenth Amendment, as a taking of its property without due process, since, as a carrier, no obligation rested upon it to put in the scales, it was pointed out that the test was whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could lawfully be compelled to meet. Holding that, as *the duty of the railway was confined to furnishing appliances for its business of transportation* and that cattle scales were not of such character, it followed that the railway could not be compelled to supply them as a means for building up the business of trading in cattle, *however much the public might be benefited thereby*, * * *." (Italics ours.)

From the foregoing cases it is clear that the land of a railroad company cannot be appropriated for a use or a service which the carrier is not obligated by law to provide, nor for furnishing an appliance not part of its business of transportation.

(c) Taxicab service is no part of the business of petitioner and it cannot be compelled to furnish land for a public hack stand under the guise of an exercise of the police power.

It is not claimed in this case that the petitioner is engaged in the operation of taxicabs or that it is under any legal duty to provide such a service. Such service is not included in its filed tariff or in the price of tickets. Nevertheless, the effect of the ordinance in question is to require the petitioner to furnish a specified area of land as a station for the parking of cabs and as a place of business for the hackmen, and this at the sacrifice of a contract arranging adequately for such service. Two classes of individuals are involved, the hackmen, and their patrons who are expected to arrive on the company's trains. As to the passengers, we submit that the petitioner is under no obligation, and cannot be placed under an obligation, to furnish a large area of valuable land for the parking of public taxicabs. When the railroad company furnishes the passenger with a driveway, by means of which his favorite or selected cab driver can drive up to and depart from the station door or platform, it has done all that can be legally expected or demanded in the way of affording him a safe and convenient exit from its premises. To go further, and require the railroad company to provide storage space for a large number of taxicabs, a "public hack stand," is in direct conflict with the principles announced by this Court in *Great Northern Railway Company* v. *Minnesota* and *Id.* v. *Cahill* (*supra*).

As to the cab drivers, they have no right to make use of the company's premises, and such a right cannot be conferred upon them by a municipal ordinance.

In *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, this Court said (pp. 292-296):

"Much has been said in argument as to the functions and duties of railroad companies. Under the decisions of this court there can be no doubt as to the nature of those functions or duties. * * * Necessarily, the same principles apply in reference to the use of the company's station house and depot grounds; for they are held in the same rights as are its road, its locomotives and other property or appliances employed in the transportation of passengers and freight, and must be devoted primarily to public use *to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad* * * *. (Italics ours.)

It by no means follows, however, that the company may not establish such reasonable rules, in respect to the use of its property as public convenience and its interests may suggest, * * *. Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And as incident to ownership it may use the property for the purposes of making profit for itself; * * * subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat those objects. * * * But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. * * * In Western Union Tel. Co. *v.* Pennsylvania R. R. Co. *et al.*, 195 U. S. 540, the

court considered the nature of the interest which a railroad company had in its right of way. It was there said: 'A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given, * * * So, in Pittsburgh, Fort Wayne & Chicago Ry. Co. *v.* Bingham, Admx., 29 Ohio St. 364, 370, the Supreme Court of Ohio said that *'for all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easements or servitudes'*. (Italics ours.)

* * * it would seem to be clear that the Pennsylvania Company had the right * * * to erect and maintain a passenger station and depot buildings * * * for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort and safety of passengers and the wants of shippers. * * * A hackman, in nowise connected with the railroad company, cannot, of right and against the objections of the company go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers; * * *.

The railroad company * * * had no contractual relations with the defendants and owed them as hackmen no duty to aid them in their special calling"

In this regard, we can perceive no difference in the legal status of a station driveway and that of a station building. In *Donovan* v. *Pennsylvania Company, supra,* the Court held that "the same principles apply in reference to the use of the company's station house and depot grounds." If one is "public" and the other is likewise a public place, and if the police power of a municipality extends to establishing a public hack stand on a station driveway merely because that facility may be a public convenience, there could be no argument against an ordinance adopted on the same ground establishing a parcel room, restaurant or other similar convenience in a railroad station, or establishing a trolley loop and station on the railroad land, and compelling the railroad company to provide free space for strangers to operate those conveniences, and yet if the opinion below is sound, there is nothing in the Constitution that can stop a municipality in the exercise of the asserted police power from adopting ordinances to that effect.

In *Thompson's Express Co.* v. *Mount,* 91 N. J. Equity 497, dealing with the precise question, the Court of Errors and Appeals, per Mr. Justice Swayze, said (p. 498 *et seq.*):

> "The first act to require consideration is the Railroad act of 1903. Section 22 (*Comp. Stat. p. 4230*) enacts that any railroad company may erect a fence or other enclosure around its stations so as to prevent any persons other than passengers from coming near its trains and may exclude from such enclosures all persons except travelers. The act is in substance the same as the act of 1839 (*P. L. p. 170; Rev Stat. p. 594*) and antedates by ten years the charter of the Central railroad. That railroad has therefore always had the

right to exclude from its stations all persons except travelers, and the agents of the company. *The importance of the enactment* to the present purpose *is that it demonstrates, if demonstration were needed, that the legislature could not have meant to require railroads to transport passengers beyond their own stations,* for such transportation would require the entrance of others—hackmen and the like—to the station grounds. As the railroad business developed and towns increased in size a demand arose for cab and omnibus service. This was a kind of public service which the railroads might well provide for the better accommodation of the traveling public. Even if they were without authority to do so under their charters, the case would come within the ruling of the United States supreme court in *Jacksonville Railway Co.* v. *Hooper, 160 U. S. 514* * * *.

* * * "The question we have to decide is * * * whether the railroad company can give the complainant an exclusive right in a case where neither the complainant nor any of the defendants have any right whatever, or, in other words, whether the railroad may select its own company in a case where it is under no public duty to serve all who come, and has express statutory authority to exclude all except travelers. Reason clearly answers in favor of the exclusion. The authorities above cited justify the exclusion on the ground that even where the public duty exists, the right of the railroad company to make reasonable regulations involves the right to protect itself and its passengers from the turmoil and danger involved in a competition between hackmen on the platform of a railroad station and the consequent liability of the railroad company to respond in damages to a passenger in case of

> injury. * * * A different case might arise if the railroad were under a legal duty to allow hackmen to do business and ply their calling on railroad property. Our view has not only reason on its side but also the authority of the highest tribunal, which can pass upon the question of the equal protection of the laws." (Italics ours.)

There is nothing contrary to this in *Welsh* v. *Morristown,* 98 N. J. Law, 630. The court there had before it only the ordinance forbidding all taxicab men from coming upon the station grounds. The power of the town to establish a taxicab stand on petitioner's property against its will was not in issue, nor was the railroad company a party to the suit. Moreover, as will be more fully shown hereafter (p. 24), that decision went distinctly on the ground that petitioner had opened up its property to indiscriminate use by the public generally, whereas the courts below in the present case took no such position.

The court below seems to have disregarded the limitations upon the exercise of police power which we have hereinbefore discussed. It states in the prevailing opinion below (R. p. 369):

> "Whenever private property is devoted to public use, such as that of a common carrier, it ceases to be '*juris privati*' only, and is 'affected with a public interest.' It then becomes subject to public regulation and if in that regulation the enjoyment of some of its attributes are disturbed and the owner suffers injury, this does not deprive him of his property without due process of law, nor take it without just compensation, nor deny him the equal protection of law. It is either

damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing the general benefit which the regulations confer."

And in support of this statement the court cites the following Supreme Court cases:

Munn v. *Illinois,* 94 U. S. 113;
Union Dry Goods Co. v. *Georgia Public Service Corporation,* 248 U. S. 372;
Producers Transportation Co. v. *Railroad Commission,* 251 U. S. 228.

The difficulty is that the cases cited deal exclusively with rates or with the regulation of those public services which the utility companies were obliged by law to furnish their patrons, and do not involve the use of land or the performance of duties foreign to their business. Nothing is said in any of them in support of taking land without paying for it, or in support of taking it and handing it over to individuals.

In *Wolff* v. *Court of Industrial Relations,* 262 U. S. 522, Chief Justice Taft, emphasizing this distinction between rate and other transportation service regulation and a general regulation of property, says (p. 539):

"To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. * * * It is not a matter of legislative discretion solely. * * * To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner.

> "* * * This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention."

And referring particularly to *Munn* v. *Illinois,* the court points out that what was regulated was the *owner's operation* of the elevator, a business which *he had a right to discontinue when he chose.* "These words refute the view that public regulation in such cases can secure continuity of a business against the owner. * * * The power of a legislature to compel continuity in a business can only arise when the obligation of continued service by the owner * * * is direct, and is assumed when the business is entered upon."

When we consider that the effect of the ordinance is manifestly to establish a taxicab business, which the company has not assumed as an obligation, and to compel the railroad company to become a partner to the extent of furnishing the land essential thereto, for the "parking of cabs awaiting fares", but over which the railroad company is given no management and no return, and has not the power to discontinue at its will, the inapplicability of the *Munn* and similar cases to the question here, and the consequent conflict with the judgments of the Supreme Court, seem to us to be manifest.

Along the same line is the statement in the opinion below that the railroad company, in providing a driveway practically dedicated it to public use and regulation. This is in conflict with the decision in *Donovan* v. *Pennsylvania Co., supra.*

As the railroad company is not required to furnish taxicab facilities, and no charge for such facilities is impliedly included in the rates of fare, and as no compensation is provided for the use of the land devoted to parking of taxicabs, the situation comes squarely within the judgment of Mr. Justice Butler in *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, where he said (p. 420) that:

> "The commission, under the guise of regulation, may not compel the use and operation of the company's property for public convenience without just compensation."

And there can be no question that this ordinance is the same sort of unauthorized action as is referred to by Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, where he said:

> * * * "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. * * * When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> * * * it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * *We are in danger of forgetting that a strong public desire to improve the*

public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (Italics ours.)

The foregoing observation is distinctly at variance with the statement in *Ex parte Vance,* 62 S. W. 568, cited in the prevailing opinion in the court below, that

> "it is presumed that the municipality which is entrusted with the safety and convenience of travelers is the best judge of the conditions and environment, and that it will not act in an unjust or oppressive manner, but for the good of the community."

(d) The ordinance cannot be upheld as securing the performance of a legal duty owing by the railroad company to its passengers—in other words, as a regulation of transportation.

If the opinion of the court below means that the land is subject to regulation because its owner is a common carrier, and that the ordinance must be regarded as securing the performance of a legal duty owing to the company's passengers—in other words, a regulation of transportation—we think the court has overlooked the fact that it is not shown, or claimed, that the municipality is invested with such power by the legislature of the state. The court must take judicial notice of the state statute (*Vagaszki* v. *Coal Co.,* 225 Fed. 913), which confers exclusive jurisdiction of the regulation of the services and property of a common carrier upon an administrative body, to wit, the Board of Public Utility Commissioners (P. L. New Jersey, 1911, Chapter 195, Section 1).

> "15. *The Board shall have general superivision and regulation of, jurisdiction and control over all*

> *public utilities, and also over their property, property rights, equipment, facilities and franchises* * * *. The term 'public utility' is hereby defined to include every * * * corporation * * * that now or hereafter may own, operate, manage or control within the State of New Jersey any steam railroad * * *". (Italics ours.)

There is nothing in *Welsh* v. *Morristown*, 98 N. J. Law, 630, that casts any doubt on the proposition that the town was without jurisdiction under the local law. From the following excerpts from the opinion in that case it appears that the New Jersey Court of Errors and Appeals thought that it was dealing with property over which the public generally had an easement to pass and repass—in other words, a public highway. Said the court at page 632:

> "The Town claims the right to enact this ordinance generally by virtue of its police power to regulate traffic in public places, * * * the contract declared that 'said driveway which is the subject of the ordinance shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris Street in Saw Mill Lane but this contract shall not be construed as a dedication of said driveway as a public highway.' *It thereby and otherwise appears that the driveway in question was and is devoted to public use,* although the fee thereof remained in the railroad company."

And again at page 633:

> "As we have pointed out, *the public generally had the right to use the driveway in question,* * * *."

And finally on page 634:

> "The prosecutor relies mainly on the case of *Thompson's Express Co.* v. *Mount,* 91 N. J. Eq. 497. But that case is not in point. There the only part of the railroad company's property which was involved was the platform of the Lakewood station, *upon which no one had a right other than passengers or others having business with the railroad; whereas, here, the public generally have the right to use the driveway.*" (Italics ours.)

The courts below in the present case have not agreed with the New Jersey Court of Errors and Appeals that the driveway was open to use by the public generally. The District Court held specifically that the *locus in quo* was a private way open only to petitioner's business visitors and a certain other group of persons specified in the elevation contract. The Circuit Court of Appeals agreed that the driveway was private property but held that its devotion to the railroad business was such a public use as gave to the town power to enact the ordinances here in question—that is, exactly the same power that the town would have over a public highway.

It is petitioner's position (1) that the fact that its property is devoted to the railroad business, while giving to the state authorities greater powers than they would have over the property of an individual, yet gives them far lesser powers than they would have over a public highway and (2) that under the State law, the fact that the driveway here

in question is devoted to the railroad business vests jurisdiction to exercise whatever powers of regulation the Federal Constitution permits with the Board of Public Utilities Commissioners and not with the town.

We cannot assume that the court intended to hold that a municipality of New Jersey has jurisdiction and powers which the state has not granted to it, but which it has specifically conferred upon and vested in an agency of the legislature; but the intimation in the opinion that the ordinance is justified because the lands are those of a common carrier and therefore subject to municipal control seems to assume a legal fact in conflict with the state law.

POINT II.

The contract of 1912 did not operate to grant to or confer upon the municipality the right to exclude the petitioner from the use of its own land and to establish thereon a public hackstand against its express objection.

In the brief of the municipality filed in opposition to the granting of the writ herein, we find such passages as

> "* * * although it (the land upon which the driveway is located) may be private property in one sense it is nevertheless devoted to a public use * * *" (Brief, p. 13).

and

> "* * * the driveway physically runs into Lackawanna Place, *so that leaving out the question of boundary lines it is to all intents and purposes a street* * * *" (Brief, p. 12). (Italics ours.)

These statements simply ignore the important facts of boundary lines, termination of a public street and the beginning of private property as well as the specific provisions of the contract of 1912 that

> "this contract shall not be construed as a dedication of said driveway as a public highway."

They evade the question which goes to the foundation of the asserted municipal power—whether this land with which we are dealing is private, under the dominion of the owner, or public, under the dominion of the municipality and subject to such use as it may prescribe.

The record clearly shows the character of petitioner's tenure of its station grounds. It is conceded by stipulation (R. p. 359) that the lands in question upon which are located the driveways, parking areas, walks and platforms are owned in fee simple by the petitioner's lessor and are in petitioner's possession. The nature of petitioner's possession and title was stated by the Court of Errors and Appeals in *United States Pipe Line Co.* v. *D. L. & W. R. R. Co.*, 62 N. J. L., pp. 254, 261, as follows:

> "By a lease dated December 10, 1868, the Morris and Essex Railroad Company demised to the Delaware, Lackawanna and Western Railroad Company its franchises, together with all lands, real estate, rights of way, and all its other property and rights of every kind, real, personal and mixed, with the hereditaments and appurtenances, for the full term of the continuance of its charter and all renewals thereof. This lease was validated by an act of the legislature passed in 1869. The terms of the lease and of the act of validation are set out in State Board of Assessors *v.* Morris

and Essex Railroad Co., 20 Vroom 193, 207, 211. By force of this lease and the validating act the title of the Morris and Essex Railroad Company to the premises in question became vested in the plaintiffs."

It is conceded that the town has not established any rights by legal proceedings (R. p. 368); that the driveway in question has not been dedicated to public use (P. 8, Brief opposing petition herein) and it claims no rights by prescription. Since, as we have shown, the lands of the railroad are private as between it and cab drivers and respondents cannot justify the ordinance as an exercise of the police power, the question therefore, is: Has petitioner granted to the municipality any rights in these premises inconsistent with its own dominion over them, and which authorize the municipality to formally and conclusively subject said lands to a definite public use. The municipality asserts such a right and power, basing its contention upon the provisions of a contract entered into by the petitioner and the respondent municipality on September 24, 1912. This contract dealt primarily with the subject of eliminating grade crossings. The provisions of it, upon which the town relies as the warrant for establishing a hackstand on the petitioner's land, and prohibiting the parking of private vehicles of the railroad company's passengers, are as follows (R. p. 316):

VI.

"The Railroad Companies shall lay out, locate and construct a new driveway and station grounds approach extending northerly at right angles from

> Morris Street * * * to the westerly side of their tracks as relocated, and extending thence under and across the said tracks and easterly at right angles therefrom to the easterly and southerly lines of the lands of the railroad companies, * * * Said driveway shall be forty-eight (48) feet in width. * * * The railroad companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris Street in Saw Mill Lane, *but this contract shall not be construed as a dedication of said driveway as a public highway.*" (Italics ours.)

Notwithstanding the express provision that "this contract should not be construed as a dedication of said driveway as a public highway", the municipal authorities assert that the language "said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad, and for the use of those *now* having rights of egress to Morris Street, in Saw Mill Lane" converts this land into a quasi public place, which should on that account be subject to regulation under the police powers of the municipality, and that the setting apart, taking and devotion of a portion of the property for the establishment thereon of a public hackstand, for cabmen to park their cabs and solicit business, is merely a phase of such regulation.

Such regulation, however, is appropriate only over a public highway and any intent to dedicate the driveway here in question is negatived by the express terms of the contract. It is well settled under New Jersey law that in the face of an express disclaimer of an intent to dedicate, mere sufferance by an owner of general public user of his premises is insufficient to establish a dedication.

Wood v. *Hurd,* 34 N. J. L. 87, 90, 91.

See also:

Irwin v. *Dixion,* 9 How. 10, 30;
McKey v. *Hyde Park,* 134 U. S. 84, 96;
Folkestone Corp. v. *Brockman* (1914), A. C. 338, 367.

Neither can it be contended that in promising to keep the driveway open for those groups of persons mentioned in the contract, the railroad, in effect, promised to keep it open for the use of the public generally. Such a construction would be strange, unnatural and in direct conflict with the intention of the parties as may be gathered from the context of the agreement.

A railroad corporation owes to its passengers a common law duty of providing and keeping open in good and safe condition, proper and convenient means of access to and egress from a station, particularly if the building, as in this case, does not abut immediately upon the public highway, and this provision of the contract in specifying ample means of access to the station, does no more than to recognize and express this well understood common law duty. The contract, however, not only expressly negatives the

notion that the driveway shall become a public highway, or shall be devoted to indiscriminate public use, but significantly limits the use thereof, to wit "to traffic to and from the station grounds on the easterly side of said railroad". No grant to the town or to the public of the use of these premises for a public hackstand can be found in this contract, except by twisting it into a meaning directly contrary to that ordinarily attaching to the words employed.

As Judge Buffington states in his dissenting opinion (R. p. 373), the covenant that

> "this contract shall not be construed as a dedication of said driveway as a public highway",

is the covenant of the town as well as the railroad, and the municipality cannot, and the courts should not, really and in fact, make the *locus in quo* a public highway by exerting over it a municipal control which can only be exercised over public streets. *The majority opinion, however, does not mention or construe this clause,* and we submit that it is prejudicial error to fail to give effect to this plain language of the contract.

It is further insisted, however, that the town has some rights, the nature of which is somewhat vague, arising from the other phrase of the provision quoted, that the driveway shall be kept open "for the use of those *now* having rights of egress to Morris Street in Saw Mill Lane." It appears from the evidence that Saw Mill Lane was a way extending from Morris Street to some point easterly of the railroad. Article V of the contract provided:

> "The Town shall vacate Saw Mill Lane from its intersection with Morris Street to the northerly ter-

minus, *or so much thereof between said points as now exists as a public street or highway of said Town*" (R. p. 315). (Italics ours.)

From this language it appears that when the contract was made, the parties were in doubt as to how much of Saw Mill Lane from its intersection with Morris Street to the northerly terminus did exist as a public highway. Subsequently this strip or way, which was privately owned, was conveyed to petitioner's lessor in two parcels, one lying north and one lying south, of the main tracks (R. p. 360). However, under and pursuant to this article of the contract, Saw Mill Lane from its intersection with Morris Street to the northerly terminus, which apparently embraces the whole extent of the lane, ("or so much thereof between said points as now exists as a public street") was vacated and all public rights therein extinguished (R. pp. 291, 292).

And so the language of Article VI, which mentions the use of the driveway by those "*now* having right of egress to Morris Street in Saw Mill Lane" imports *not a public use, but a private right in a private way.*

It is true that the State Court in *Welsh* v. *Morristown, supra,* took a contrary position. But it is submitted that the District Court (R. p. 51) rightly disregarded that case as not being the law of New Jersey on the facts here shown.

The court in the *Welsh* case held that the driveway was open to use "by the public generally" "although the fee thereof remained in the railroad company." It is the law of New Jersey established by a long uninterrupted line of decisions that in a case of the dedication of land as a

public highway, the fee remains in the dedicator and may be aliened by him. The land is merely opened to public user—an easement is created in favor of the public.

Dummer v. *Board of Selectmen,* 20 N. J. Law, 86;
Trustees of the Methodist Episcopal Church v. *Hoboken,* 33 N. J. Law, 13;
Pennsylvania Railroad Company v. *Ayres,* 50 N. J. Law, 660;
Van Duyne v. *Knox Hat Manufacturing Company,* 71 N. J. Equity, 375;
Tweddell v. *South Orange,* 112 Atlantic, 511.

This is precisely the effect that the court in the *Welsh* case gave to the elevation contract and the control over the driveway which it accorded to the town was identical with that which the town would exercise over a public highway. This was pointed out both by Judge Bodine in the District Court (R. p. 51), and by Judge Buffington in his decision in the Circuit Court of Appeals (R. p. 373).

Therefore the effect of the holding in the *Welsh* case was to read completely out of the contract the covenant that

> "* * * this contract shall not be construed as a dedication of the said driveway as a public highway."

Such disregard of an essential covenant of a contract is not in accordance with the law of New Jersey, or, in fact, of any other jurisdiction.

A further contention of the town rests upon a paragraph in Article VII of the contract (R. p. 317), as follows:

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the

station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, *and for the enforcement of the rules and regulations of the railroad companies in respect thereto.*" (Italics ours.)

It is submitted that this passage is plain and unambiguous in meaning if it be taken as a whole and that it leaves no room for any construction by the court. Taken in isolation, the words "police powers" might denote either the legislative power of the state to act to promote the public welfare or the obligation of patrolling the "station, station grounds, approaches and driveways." Taken in the context of the contract, there is no doubt that the expression means the latter and the latter only. It is stated that "the town may and shall exercise all necessary police powers *in and upon* the station," etc. The prepositions "in and upon" express location and not subject matter. The natural expression to denote subject matter would have been "in reference to" or "over". The real subject matter is indicated by the subsequent words "for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto." It is clear that the words "in and upon the station, station grounds, approaches and driveways" express the place where the powers are to be exercised. *The words would be without sense if applied to the legislative power of the state.* The "police powers" that the town was to exercise "in and upon" the station grounds, approaches, etc., was the obligation of maintaining police officers on the property for the direction of foot and

vehicular traffic at the station and so far as this was to be in accordance with "rules and regulations" and not in accordance with the exigencies of the moment, it was, by the express terms of the contract, to be in accordance with the "rules and regulations of the railroad company in respect thereto." This is the language that cannot escape attention.

As this part of the contract cannot be ignored or expunged, it must be given effect, and the only effect which can be given to it is that the railroad company contemplated, and provided for, the promulgation of rules and regulations governing both foot and vehicular traffic at said station; that such rules and regulations should be enforced, and that the town obligated itself to exercise all necessary police power for the enforcement of the rules and regulations made by the railroad company for the purpose of regulating such foot and vehicular traffic. It is significant that no mention is made of any rules or regulations to be made by the town; nevertheless the contention on the part of the town is, as we understand it, that it acquired the right under this provision to regulate traffic on the petitioner's lands according to its own discretion, irrespective of the wishes or desires of the railroad company, and that the provision for the enforcement of the rules and regulations of the railroad companies has and should be given no effect whatever (See testimony of Mayor Potts, R. p. 230). It is a startling proposition that any part of a contract solemnly entered into can be bodily and unceremoniously thrown out and disregarded. Manifestly this contention cannot be upheld. To adopt and sanction the construction contended for by the municipality would permit the town to determine the particular door or doors through which a passenger could enter or

leave the station. It could absolutely prohibit a passenger from entering the station grounds with his automobile or other vehicle. No construction permitting such absurdities would be permitted by any court. But in any event nothing in this provision can be construed as a grant by the petitioner to the municipality of any portion of its lands for the establishment thereon of a public stand where private hackmen, pursuing their own vocation, should have a place for the transaction of their private business affairs, or that the railroad company intended, after laying out extensive grounds for the use of its patrons, that the town should have the right to prevent such use. The map annexed to the bill shows that the petitioner's station grounds are elaborate and commodious, and were evidently designed for the accommodation of the vehicles belonging to the patrons of the railroad company, a facility especially required in a residential town like Morristown. The contract very clearly indicates that the railroad company contemplated that this system of driveways would necessitate some regulation of its use, and while it is provided that the laying out of the driveways should not be construed as a dedication to public use, it also expressly provided for the enforcement of its own rules and regulations with respect to foot and vehicular traffic by the aid of the police powers of the town. This provision obviously secures to the railroad company a right to service from the city police force which it might not otherwise have, but it certainly does not import a surrender of any rights which it then had as the owner of these premises.

Lastly, it is insisted that the right claimed by the town to set aside a certain portion of the station grounds for the

purpose of a public hackstand arises from a practical construction of the contract by the acts of the parties to it. The only facts presented in support of this claim are that after the construction of the station layout in 1914, the cabmen used the station grounds without objection on the part of the railroad company, which is admitted; that on one or two occasions the chief of police (R. p. 241), acting on verbal instructions from the mayor (R. p. 337), issued verbal orders to the cabmen with respect to their activities, and that at different times of the day town policemen visited the station. It is admitted, however, that the instructions to the chief of police, or his orders to the cabmen, were never communicated to or brought to the attention of any responsible official of the railroad company (R. p. 157). Neither is it contended that, at any time since the station was built, there had been any communication or arrangement between the town authorities and the railroad authorities with reference to police control or surveillance of the taxicab men.

The whole sum and substance of the matter is, that until the objectionable conduct of the taxicab men (R. pp. 81, 83, 85, 87, 96, 125) and the poor condition of their cabs (R. p. 124) brought about this controversy, the cabmen used the station grounds, and the railroad company passively permitted it, without the assertion of any right on one side or objection on the other, but neither the establishment of a public hackstand by formal municipal authority, nor the exclusion of the railroad company's patrons from any part of the station grounds, has any history or precedent as a basis for the present contention that those burdens were imposed upon the railroad company's lands by a practical construc-

tion of the contract. On the other hand, the petitioner, by excluding all independent cabmen and contracting for a taxicab service under its own supervision, effectually established a "regulation" of its station grounds (*Thompson* v. *Mount*, 91 N. J. Eq. 497), which was the first formal and definite action taken by any one with respect to the situation. The petitioner followed this action by obtaining a preliminary injunction from the Court of Chancery of New Jersey, restraining the independent cabmen from continuing the use of its premises (R. p. 166). The situation then was that the railroad company's contractor was the only taxicab operator in use of its premises. Nevertheless the town then proceeded to adopt an ordinance (R. p. 346) *forbidding all taxicabs from using the station grounds*, having just the opposite effect of the ordinance under review. Aside from the fact that the only purpose of the first ordinance was to prevent the company's contractor from performing his contract, it shows that the town has not, as a practical construction of the contract, consistently insisted upon the maintenance of a hackstand on the railroad company's land, but that its first formal action was to abolish whatever existed as a hackstand on the premises.

Conclusion.

The case presented is so concisely yet so completely stated by Judge Buffington in his dissenting opinion that we here print it in conclusion of our argument.

> "Under whatever form of words the matter may be stated, the simple fact is that the railroad's prop-

erty has been taken from it without compensation and it is now denied possession of its own ground. In its agreement with the city it asserted its private ownership of this private road, so what has been now taken for public use, under the guise of public property, is in fact private property. Because the constitution forbids taking private property for public use without compensation, I record my dissent. What happened was that the railroad laid out and built a 'driveway and station ground approach'; it granted a public right of access to and from its station over such driveway in these words: 'Said driveway shall be kept open at all times for passengers, pedestrians * * * and general vehicular traffic to and from the station'; but far from surrendering its property and constituting it a public road, with all the incidents of municipal road control over municipal streets and highways, this contract with the municipality expressly stipulated—and it is the covenant of the municipality as well as the railroad—that 'this contract shall not be construed as a dedication of said driveway as a public highway.' In the face of this agreement the city cannot, and Courts should not, really and in fact, make the *locus in quo* a public highway by exerting over it a municipal control which can only be exercised over public streets" (R. p. 372).

We respectfully submit that for the reasons herein stated the judgment of the Circuit Court of Appeals should be reversed.

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MAXIMILIAN M. STALLMAN,
Counsel for Petitioner.

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JAN 18 1928

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 147.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Petitioner,

vs.

THE TOWN OF MORRISTOWN, HENRY LADEN AND OTHERS,

Respondents.

SUPPLEMENT TO BRIEF FOR RESPONDENT, THE TOWN OF MORRISTOWN.

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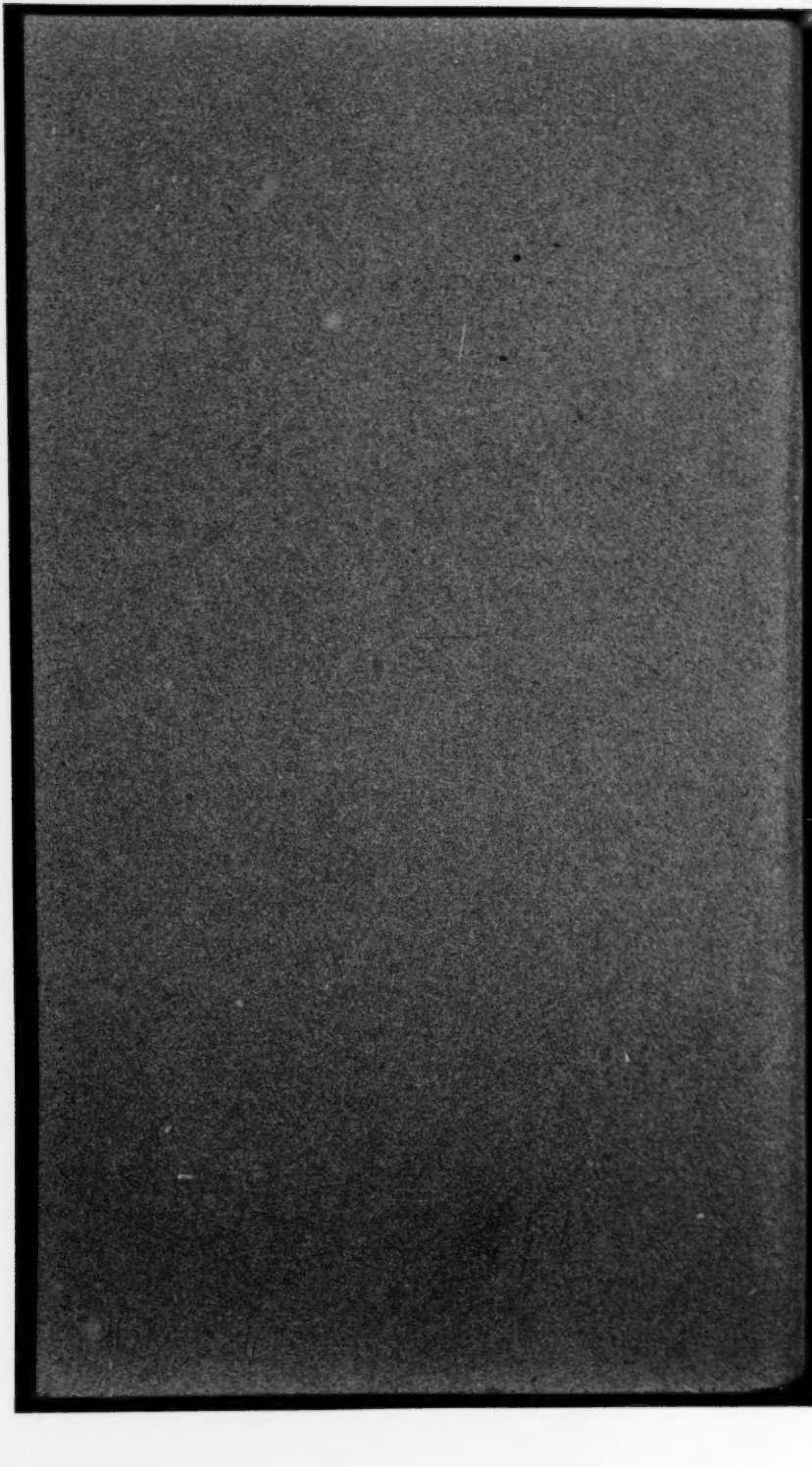

INDEX.

PAGE

The New Jersey Law Relating to the Dedication of Streets and Highways..... 1

The evidence showing that the parking place established by the Ordinance of October 22nd, 1924 is located at the same place as was the old parking place established by Mayor Todd..... 9

The text of the decision of the New Jersey Court in the Welsh Certiorari Case (Welsh *v.* Morristown, 98 N. J. Law, 630)..... 14

Copy of the Report of Welsh *v.* Potts, 99 N. J. Law, 528; affirming Welsh *v.* Morristown, 98 N. J. Law, 630 20

CASES CITED.

	PAGE
Arnold *v.* City of Orange, 73 N. J. Eq. 280	6, 8
Block *v.* Central Railroad Co., 85 N. J. Law, 197	2
Clark *v.* Elizabeth, 40 N. J. Law, 172	4
Darling *v.* Mayor &c. of Jersey City, 73 N. J. Law, 318	5
Dummer ads Board of Selectmen, 20 N. J. Law, 86	2
Hohokus *v.* Erie Railroad Co., 65 N. J. Law, 363	3, 4
McAndrews & Forbes Co. *v.* Camden, 78 N. J. Eq. 244	5
Peoples Traction Co. *v.* Atlantic City &c. Ry. Co., 71 N. J. Law, 134	7
Ridgefield Park *v.* N. Y. S. & W. R. R. Co., 85 N. J. Law, 278	5
Schmidt *v.* Spaeth, 82 N. J. Law, 575	3
Schmidt *v.* Spaeth, 86 N. J. Law, 179	7
South Amboy *v.* New York &c. R. R. Co., 66 N. J. Law, 623	6
Trustees of M. E. Church *v.* Hoboken, 33 N. J. Law, 13	2
United N. J. R. & C. Co. *v.* Crucible Steel Co., 85 N. J. Eq. 7; 86 N. J. Eq. 258	6
Welsh *v.* Morristown, 98 N. J. Law, 630	8, 14
Welsh *v.* Potts, 99 N. J. Law, 528	20

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SUPPLEMENT TO BRIEF FOR RESPONDENT, THE TOWN OF MORRISTOWN.

This supplement is filed by direction of some of the Justices at the argument.

The New Jersey Law Relating to the Dedication of Streets and Highways.

Our contention in our main brief was (Brief, p. 36) that the fact that the Railroad had never dedicated the land in the driveway in the strict legal sense of the word "dedicate", did not militate against the authority of the Town both under its police powers and under the contract to regulate traffic in the driveway.

Mr. Justice Brandeis requested that we furnish the court with a citation of the New Jersey cases showing the law of New Jersey with respect to the dedication of a highway.

In *Block* v. *Central Railroad Co.*, 85 N. J. Law 197, the word "dedication" is defined by the Court of Errors and Appeals as (p. 202),

> "the permanent devotion of private property to a use that concerns the public in its municipal character."

In *Dummer ads Board of Selectmen,* 20 N. J. Law 86, the Court said, page 107:

> "No particular *form* of dedication is necessary, 6 *Peters,* 440, nor is it essential to the validity of a dedication, that the land shall be in the actual use or occupation of the public."

In *Trustees of M. E. Church* v. *Hoboken,* 33 N. J. Law 13, the Supreme Court, by Justice (afterwards Chief Justice) Depue, said (p. 18):

> "But where the right of the public to the use of lands rests upon no other foundation than a dedication to public uses, the cases uniformly hold that the easement is vested in the public. A dedication to public uses does not require the existence of a corporation to whom it is made, or in whom it—the title—should vest. It may be valid without any specific grantee *in esse* at the time, to whom the fee could be granted. And in this respect it forms an exception to the general rule of transferring or creating an interest in lands, as it may be done without a deed, and without any person competent to accept the grant as grantee. The public is an ever existing grantee, capable of taking a dedication for public uses. *Wash. on Easements* 128.
>
> In fact it is the essence of a dedication to public uses that it shall be for the use of the public at large. There may be a dedication of lands for special uses, but it must be for the benefit of the public, and not for any particular part of it. *Wash. on Easements* 135; *Munson* v. *Hungerford,* 6 Barb. 265; *Curtis* v. *Kessler,* 14 Barb. 512; *Talmadge* v. *East River Bank,* 26 N. Y. 105. There may be a dedication of a way for a limited purpose, as for a foot way, but there cannot be a dedication to a limited part of the public, as to a parish. *Poole* v. *Husk-*

inson, 11 M. & W. 827; *Vestry of Bermondsly* v. *Brown,* L. R. 1 Eq. Cases 204.

There can be no dedication, properly speaking, to private uses. A private way cannot be created by dedication. *Wash. on Easements* 129; *Hale* v. *McLeod,* 2 Metcalf (Ky.) 98; *Com.* v. *Low,* 3 Pick. 413, per Morton, *J.*"

In order for property to be dedicated to public use under the law of New Jersey there must be a dedication by the land-owner and an acceptance by the municipality.

In *Schmidt* v. *Spaeth,* 82 N. J. Law, 575, the Court of Errors and Apeals said, page 578:

"But the dedication of land for the purpose of a public highway does not, *ipso facto,* create such a highway. There must be not only a dedication by the owner for that purpose, but an acceptance of that dedication by the public, in order to create it. *Holmes* v. *Jersey City,* 1 Beas. 309; *Pope* v. *Town of Union,* 3 C. E. Gr. 283; *Attorney-General* v. *Morris and Essex Railroad Co.* 4 *Id.* 391; *Booraem* v. *North Hudson County Railway Co.,* 12 Stew. Eq. 467; S. C., on appeal, 13 *Id.* 563; *New York and Long Branch Railroad Co.* v. *South Amboy,* 28 Vroom 258, 259. Such acceptance may be indicated by formal action on the part of the representatives of the public having authority over highways, or by public user of the dedicated land. *Booraem* v. *North Hudson County Railway Co.,* 13 Stew. Eq. 563; *Abbott* v. *Cottage City,* 143 Mass. 525; *Ell. S. & Roads* (ed. 1890) 114."

A very common method of dedication is where the owner of lands makes sales of lots with reference to a filed map.

Thus in *Hohokus* v. *Erie Railroad Co.,* 65 N. J. Law, 363, the New Jersey Supreme Court by Chief Justice Depue said, page 358:

"Where the owner of lands procures them to be laid off in blocks, streets and squares, and has a map made on which are delineated such streets and squares, which is filed among the public records of the county and by which he makes sales of lots, the streets and squares

laid down on the map become dedicated to public use. *Methodist Episcopal Church* v. *Hoboken,* 4 Vroom 13. Where the map is not made by the grantor, but he makes conveyances by reference to a city map, in which the land is laid off in streets, avenues and alleys intersecting it, he thereby adopts the map by sales with reference thereto, and his acts will amount to a dedication of the streets, avenues and alleys to the public. *Clark* v. *City of Elizabeth,* 11 *Id.* 172. The right of the several grantees to streets and avenues laid down on the map by reference to which the conveyances were made does not depend upon the fact that the map was made by the grantor. Such a right arises by force of the deeds by which the lots are conveyed."

So in *Clark* v. *Elizabeth,* 40 N. J. Law, 172, the Court of Errors and Appeals said, page 174:

"It is a general rule that where the owner of urban property, who has laid it off in lots, with streets, avenues and alleys intersecting it, sells his lots with reference to a plot on which the property is so laid off, or where, there being a city map on which the land is so laid off, he adopts that map, by sales with reference thereto, his acts will amount to a dedication of the designated streets, avenues and alleys to the public. *Angell on Highways,* § 149; *Trustees, &c.* v. *Hoboken,* 4 Vroom 13."

Where a land-owner has dedicated land to the public he loses all power of retraction even though the municipality has not yet accepted the dedication of the land.

In *Hohokus* v. *Erie R. R. Co.,* 65 N. J. Law, 353, the New Jersey Supreme Court said, page 362:

"An acceptance by the public authorities is not essential to conclude the owner from the power of retraction, when his intention to permanently abandon his property and dedicate it to public uses is once unequivocally manifested. In that event the right of the public to appropriate the lands to the public use, at any future time when their wants or convenience require it, immediately attaches. *Trustees of M. E. Church* v. *Hoboken,* 4 Vroom

13, 14; *Den* v. *Dummer, Spenc.* 86; *Mayor of Jersey City* v. *Morris Canal and Banking Co.*, 1 Beas. 547. The local municipal government within the limits of which the dedicated lands lie, by virtue of their representing the public, may maintain actions to vindicate the public right of possession. *Price* v. *Inhabitants of Plainfield*, 11 Vroom 608; *Hoboken Land and Improvement Co.* v. *Hoboken*, 7 *Id.* 540."

In *Darling* v. *Mayor, &c. of Jersey City*, 73 N. J. Eq. 318, the court said, page 322:

"I understand the law to be that a tender of a dedication cannot be revoked (*Hohokus* v. *Erie Railroad*, 65 N. J. Law (36 Vr.) 353); that it may be accepted by the municipality at any time, but that until the tender has been accepted and the dedication has ripened into a public right and a public obligation the fee-simple title and the control of the property remain in the dedicator and he may use it as he will, provided he does not in any way interfere with the right of the public to accept the dedication whenever it sees fit to do so. *DeGroot* v. *Jersey City*, 55 N. J. Law (26 Vr.) 120; *Pease* v. *Traction Company*, 69 N. J. Law (40 Vr.) 165."

In *McAndrews & Forbes Co.* v. *Camden*, 78 N. J. Eq. 244, the Court of Errors and Appeals said, page 248:

"The public right to appropriate the street thus dedicated, at any time when their wants or convenience required it, could not be defeated or impaired by any subsequent act of the dedicator, or those claiming under it. The land could only be released from the public servitude by the state itself. *South Amboy* v. *New York and Long Branch Railroad Co.*, 66 N. J. Law (37 Vr.) 623."

In *Ridgefield Park* v. *N. Y. S. & W. R. R. Co.*, 85 N. J. Law, 278, the Court of Errors and Appeals said, page 281:

"when a street has once been dedicated, the right of the public to appropriate it to their use at any time when their wants or conveniences require it, cannot be de-

feated by any subsequent act of the dedicator or of those claiming under him. *McAndrews & Forbes Co.* v. *Camden, supra, Freeholders* v. *Sharpless,* 54 Vroom 443."

In *South Amboy* v. *New York, &c. Railroad Co.,* 66 N. J. Law, 623, the Court of Errors and Appeals said, page 625:

"Neither the lapse of time nor the act of the municipal government can impair the public right to take possession of a dedicated street. The legislature alone has the power to release the dedicated lands and discharge the public servitude."

In *United N. J. R. & C. Co.* v. *Crucible Steel Co.,* 85 N. J. Equity 7, affirmed on opinion 86 N. J. Equity 258, the Court said (85 N. J. Equity, at p. 27):

"Where an owner has dedicated a street over his lands, he is estopped from retracting his dedication, and the public right at any time to appropriate the street dedicated, when required, can only be released by the legislature, or the municipality under its authority. *Hoboken Land and Improvement Co. (Court of Errors and Appeals, 1873),* 36 N. J. Law 540, 549; *McAndrews &c. Co.* v. *Camden (Court of Errors and Appeals, 1910),* 78 N. J. Eq. 244, 248."

When land has been dedicated by the owner for a public highway it must be accepted as such by the municipality in order to complete the dedication.

In *Arnold* v. *City of Orange,* 73 N. J. Eq. 280, the Court said, page 281:

"* * * a mere dedication without acceptance is insufficient to charge the dedicated land with a public use and with public liability. Mr. Justice Lippincott, in *New York and Long Branch Railroad Co.* v. *South Amboy,* 57 N. J. Law (28 Vr.) 252, says:

'Whilst the fact of dedication may be clear as against the owner or those claiming under him, yet there must exist on the part of the public a ratification or accept-

ance evidenced by some authorized formal municipal act or a public user. The public acquired no rights, nor is it subject to any burdens by reason of the dedication unless it be by some formal act of acceptance or by unequivocal public user.' *Trustees* v. *Hoboken*, 33 N. J. Law (4 Vr.) 13; *Holmes* v. *Jersey City*, 12 N. J. Eq. (1 Beas.) 299; *Booraem* v. *North Hudson Railroad Co.*, 39 N. J. Eq. (12 Stew.) 465."

In *Schmidt* v. *Spaeth*, 86 N. J. Law, 179, the Court of Errors & Appeals said, page 182:

"As we pointed out in our earlier consideration of this case, formal action on the part of such a body, indicating a present intention to accept a dedication of land as a public highway, renders it such. By 'formal action' is not meant the passing of a formal resolution by the terms of which the dedication is accepted, but such action as conclusively shows an intention to presently treat the dedicated land as an existing public way. For instance, the bringing of an action of ejectment by the municipal authorities to obtain possession of land ledicated to public uses has been held to constitute, by necessary implication, an acceptance of the dedication. *Atlantic City* v. *Groff*, 64 N. J. L. 528; *Hohokus* v. *Erie Railroad Co.*, 65 *Id.* 362. So, too, formal action by the municipal authorities providing for the paving, curbing and guttering of a dedicated street at public expense, would constitute an acceptance of the dedication. In fine, any formal action with relation to property dedicated to public use as a highway, taken by the representatives of the public having authority over highways, which can only be legally justified upon the theory that the land dedicated is presently subject to a public user, constitutes a formal acceptance of the dedication."

In *Peoples Traction Co.* v. *Atlantic City &c. Ry. Co.*, 71 N. J. Law, 134, the court held that the dedicated street had been accepted (p. 135)

"by the city by resolution, accepting them, and also by the passage of this very ordinance, in which provision is made for their improvement by paving."

In *Arnold* v. *City of Orange*, 73 N. J. Eq. 280, the court held that the construction of a public sewer constituted an acceptance. The court said, page 283:

> "I think, however, that so important a municipal act as the construction of a public sewer by proper municipal authority at the expense of the municipality in a dedicated street connected with the municipality's general system of sewers, must be held to be an acceptance of the dedication of the street through which it is constructed."

These citations would seem to fully demonstrate the New Jersey law to be that upon a dedication by a land-owner of his land for a public highway, he cannot, even before acceptance by the municipality retract his dedication, nor can he after acceptance, secure the release of the dedicated lands and the discharge of the public servitude, except by action of the municipality.

It was doubtless the recognition of this rule by the parties to the contract of 1912, which caused them to provide in the contract (Article VI, "New Street") the provision that

> "this contract shall not be construed as a dedication of said driveway as a public highway."

(R. p. 316).

Our position is that notwithstanding this reservation the Railroad, by continuously permitting the public, or that part of the public having business with the Railroad and having rights of egress to Morris Street in Saw Mill Lane, to use this driveway, has devoted it to public use, although the fee thereof remained in the Railroad Company.

The New Jersey Court in *Welsh* v. *Morristown*, 98 N. J. Law, 630, took this view. It said, page 632:

> "The contract declared that 'said driveway (which is the subject of the ordinance) shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to

Morris Street in Saw Mill lane, but this contract shall not be construed as a dedication of said driveway as a public highway.' It thereby and otherwise appears that the driveway in question was and is devoted to public use, although the fee thereof remained in the railroad company."

The evidence with respect to the fact that the parking place established by the ordinance of October 22, 1924 is located at the same place in the driveway as was the old parking place established by Mayor Todd, which was continued for some ten years.

Some of the Justices desired us to point out specifically the evidence relied on to support Point II(*b*) of our main Brief (p. 45).

In Point II(*b*) of our main Brief (p. 45) we argue:

"(b) *The parties to the suit, namely, the Railroad Company and the Town, by their conduct over a period of ten years practically have construed the contract to empower the Town to establish a parking place on the driveway in question.*"

In the supplemental statement of facts in our main Brief (p. 3) we said:

"Following the completion of the work under the Elevation Contract, the then Mayor of Morristown, John Todd, acting under authority of an ordinance of the Town, which authorized the Mayor to designate such places as public stands for hacks, cabs, etc., as he might deem expedient and proper (Exhibit D-3, R. p. 343), after some preliminary experimenting designated as a cab stand the place along the curb of the driveway on the easterly side of the shelter house, which is the same place as is now designated in the ordinance of October 22, 1924, attacked in this suit (see Todd's testimony, R.

p. 337, l. 10 to p. 339, l. 10, and see the ordinance, Exhibits C-20 and D-6, R. pp. 28 to 31, and particularly p. 29, ll. 13 to 21)."

The Town Ordinance referred to reads as follows (Ex. D-3, R. p. 343):

> "Sec. 14. The Mayor is hereby authorized to designate such places within the town of Morristown as public stands for hacks, cabs, omnibuses, stages, carriages and other licensed vehicles, as he may deem expedient and proper, and to make such regulations and give such directions respecting the places or positions to be occupied by carriages or vehicles of any description, at the public stands or at the railroad stations, or elsewhere, as may be necessary to preserve order and promote public convenience; any person who shall neglect or refuse to obey any regulations or directions of the Mayor, authorized to be made or given by him, shall forfeit and pay a sum not exceeding Ten Dollars for each and every offense."

Mayor Todd first placed the public cabstand on the driveway in question near the triangular flower bed shown on the Map, but that was not a satisfactory location. This constituted the "preliminary experimenting" mentioned in our main Brief at page 3.

Shortly thereafter Mayor Todd changed the location and established the public cabstand at the place where it is now placed by the ordinance of October 22, 1924, under attack in this suit.

All this appears from the following evidence in the Record sent up:

John Todd testified (R. p. 334, line 13):

> "Q. Were you ever mayor? A. Yes.
>
> Q. From what year to what year? A. January 1, 1913, to January 1, 1915.
>
> Q. At the time you were mayor was the construction under way of the change of the grade of the Lackawanna Railroad tracks? A. It was.

Q. Pursuant to an agreement which had been entered into between the town and the railroad, dated September 24, 1912? A. Yes."

After identifying Section 14 of the ordinance (R. p. 335, line 15) which is quoted above, John Todd further testified (R. p. 336, line 23):

"Did you, pursuant to that section of the ordinance, make any designation of a hack stand on the plaza of the Lackawanna Railroad after the construction of the improvements had been completed, pursuant to the agreement D. 2 in evidence?

Mr. Stallman: I object to the question on the ground that whether or not any such designation was made by the mayor at that time is immaterial and irrelevant to the question of the validity of the ordinance under review.

A. I did.

Q. Where did you designate such hack stands to be?

Mr. Stallman: I object to that question on the same ground stated in the objection to the preceding question.

A. At the main station, at the wall at the end of the terrace.

Q. On the east or west side of the tracks? A. I think that is the west side—the main entrance to the station.

Q. Where else? A. There was a walk in between, and the east side I designated as a hack stand and cab stand.

Q. Did you designate any other stand? A. I did, on the opposite side, the east side, so-called, just opposite the railroad station. First, that did not work out satisfactorily, making a confusion and congestion of traffic. I abolished the stand opposite, and made a new stand alongside of the station, between the express office and the entrance.

Q. *By the side of the station, you mean where?* A. *Right up against the sidewalk.*"

Clyde Potts, the present Mayor, testified as follows (R. p. 165, line 20):

"Q. Now, to your knowledge following the completion of the elevation work where did the taxicabs, public taxicabs, park, on the east side of the tracks, north side I guess would be more accurate. A. East side, I guess.

Q. The tracks run east and west, north and south, all right; on the east side of the tracks? A. They first parked on the,—across the plaza from the shelter house on the sidewalk there, and then later they were changed to the westerly side of the plaza, *backing up against the sidewalk under the abutment wall.*

Q. *That is the easterly wall?* A. *Yes, sir, to the place that is in controversy in this case.*

Q. Do you know how long that continued along that easterly wall? A. Oh, it continued there until some time in January of 1913 when the injunction granted by Vice Chancellor Foster was served on the town and the cabmen."

W. Parsons Todd, a brother of John Todd and a commuter on the Lackawanna Railroad for some twenty-five years, testified (R. p. 233, line 23):

"Q. Have you had opportunity to observe the traffic conditions with respect to cab service and what not at the station? A. I have very carefully.

Q. You know of the passing of the ordinance which is referred to in the bill of complaint, which was passed in October of this year? A. I do.

Q. Following the passing of that ordinance where did the cabmen park their cabs and where did they stand when they solicited traffic? A. In the old, previous cabstand to the west of the shelter house, I guess you call it shelter house.

Q. *Along the easterly wall of the elevation?* A. *Yes.*

Q. *Do you remember the place where your brother as Mayor designated a cab stand?* A. *I do.*

Q. *Is that the same place you are speaking of?* A. *Same place.*

Q. Prior to the time when the contract with Welsh was made, which was the latter part of the year 1922, do

you know where the cabmen parked their cabs? A. In the same place.

Q. Do you know whether the Town of Morristown through its police department exercised any authority or jurisdiction on the station plaza? A. Yes; I have seen policemen there many times.

Q. Do you know whether they exercised any jurisdiction over the traffic? A. Yes, they did."

Police officer Meeker testified (R. p. 251, line 21):

"Q. Do you remember when Mayor Todd fixed that parking place? A. Yes, sir.

Q. Cab stand along the easterly wall? A. I do.

Q. That continued for some ten years, that cabstand, it stayed there for about ten years, didn't it, the one Mayor Todd fixed? A. Let's see, it must have been around ten years, yes, because it is about twelve years since the station was there.

Q. Were you as a police officer down there having to do with the traffic? A. Yes, sir."

The Circuit Court of Appeals, in speaking of the situation on the ground, says (R. p. 366, line 38):

"There is a driveway on the easterly side of the shelter house and the cab stand is along the curb of the driveway just north of the shelter house. This same place was designated as a cab stand by Mayor Todd shortly after the tracks were elevated pursuant to the contract between the town and the company of September 24, 1912, and had been so used until December 28, 1922, when the railroad company entered into a contract with LaClare L. Welsh."

The Text of the Decision of the New Jersey Court in the Welsh Certiorari Case.

The following is a copy of the report of the case of *Welsh* v. *Morristown*, 98 N. J. Law, 630; cited in our main Brief at pages 11, 13, 14, 19, 41, 42 and 45; and cited in the Brief of the Petitioner at pages 19, 24 and 32.

NEW JERSEY SUPREME COURT.

LaClare L. Welsh, Prosecutor, v. The Town of Morristown et al., Defendants.

Argued June 6, 1923—Decided July 20, 1923.

1. An ordinance enacting that no automobile or other vehicle shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, in a designated public place, is, under present-day conditions, a "regulation of traffic."
2. The town of Morristown has authority by virtue of its municipal and contractual powers, by ordinance to enact that no automobile or other vehicle shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, in a designated part of a public driveway girdling a railroad station where the railroad company owning the fee had expressly granted to the town the right to regulate traffic. The town has power to enact such ordinance even though the railroad company, before the passage thereof, had granted to the prosecutor, a taxicab man, the exclusive right to solicit business on its station grounds and the exclusive privilege of parking vehicles at the place in question. Such ordinance, resting both on general municipal power and on the provisions of a track elevation contract (antedating that of the prosecutor) between the town and the railroad company (no question of lack of notice to the prosecutor being raised), does not deprive the prosecutor of his property without due process of law, nor take his property for public use without just compensation, nor deny him the equal protection of the laws.

On *Certiorari*, &c.

Before Justices Trenchard, Parker and Bergen.

For the prosecutor, MAXIMILIAN M. STALLMAN.

For the defendants, NATHANIEL C. TOMS and CONOVER ENGLISH.

The opinion of the court was delivered by.

TRENCHARD, *J.* This writ brings up an ordinance of the town of Morristown entitled "An ordinance to regulate traffic on the driveway lying on the east side of the shelter-house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American railway express office to Lackwanna place." It ordains that—

> "1. No automobile or other vehicle, either private or that which may be engaged in the transportation of passengers for hire, shall be parked or shall be allowed to stand for a longer time than is necessary to take on and let off passengers, expressage or baggage, and in no case for longer than two minutes, along the curb on the westerly side of the driveway mentioned in the title of this ordinance from the southerly side of the entrance-way to the shelter-house or the tunnel leading under the depot, northerly to the turn of said driveway under the railroad.
>
> "2. No automobile which may be engaged in the transportation of passengers for hire shall be so parked or so allowed to stand as prohibited in section 1 hereof on the remaining part of the westerly side of said driveway."

A penalty for violation is prescribed in the ordinance.

The status of the prosecutor is that he has a contract with the railroad company to furnish exclusive taxicab service at the station. That contract was entered into before the ordinance in question was passed. By it the company states its desire to regulate cab service and grants to the prosecutor "the exclusive right to solicit business as a cabman" on its

station grounds, and "the exclusive privilege of parking vehicles employed in said cab service when not in actual use in the spaces shown in green on the blueprint map hereto attached." One of such spaces is that described in the ordinance.

No question is raised with respect to the passage of the ordinance, nor is it challenged as an unreasonable exercise of municipal powers. Of the four reasons assigned by the prosecutor, the first is generally that it is beyond the power of the town to enact, and the other three rest on constitutional grounds, viz., that it deprives the prosecutor of his property without due process of law—takes his property for public use without just compensation and denies him the equal protection of the laws.

As we have seen, the ordinance in form and substance is on its face aimed at the regulation of vehicular traffic at the railroad station at a particular place in the driveway lying on the east side of the shelter-house of the railroad company extending from the American railway express office to Lackawanna place.

The town claims the right to enact this ordinance generally by virtue of its police power to regulate traffic in public places, and specifically by virtue of a contract with the railroad company made in 1912 and relating to the elevation of the station and tracks so as to avoid grade crossing. This contract was entered into by virtue of the various enabling statutes in that regard, particularly the act of 1901. *Pamph. L.* 116; *Comp. Stat.* p. 4266. It provides for a change in the station approaches partly by a new street to be laid out and made by the town and partly by a roadway built by the company. The general scheme as carried out resulted in a driveway girdling the station consisting in part of a plaza (the driveway in question) connected at its north end with Morris street (a main highway) by a roadway built by the company, and at the south end through the new street called Lackawanna place, a dedicated public street. The contract

declared that "said driveway (which is the subject of the ordinance) shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris street in Saw Mill lane, but this contract shall not be construed as a dedication of said driveway as a public highway." It thereby and otherwise appears that the driveway in question was and is devoted to public use, although the fee thereof remained in the railroad company.

This track elevation contract also contains this broad and significant language: "It is further agreed that the town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto."

In our opinion that is a plain declaration that the foot and vehicular traffic at the station and in the station driveways is to be regulated by the town, and we have no doubt an ordinance enacting that no automobiles or other vehicles shall be parked or allowed to stand a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, is, under present-day conditions, a regulation of traffic.

By the contract with the prosecutor, as we have pointed out, the company undertook, in derogation of the control granted by the contract with the town, to establish a parking stand directly in one of the main driveways girdling the station, and where the town authorities might well say it is an obstruction and a nuisance.

For reasons presently to be stated, we deem the ordinance within the municipal and contractual powers of the town.

We think that the prosecutor, in contracting with the company, did so subject to the town's rights generally, and

specially under the contract of 1912, and cannot override them. No question of lack of notice on his part is raised.

There can be no doubt that the town has power by ordinance to regulate traffic when reasonably necessary for public safety and good order, and to enact that no automobile or other vehicle shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers, or baggage, and in no case longer than two minutes, in a designated public place. See the charter powers (*Pamph. L.* 1865, p. 819; *Pamph. L.* 1866, p. 427) and Home Rule act (*Pamph. L.* 1917, p. 358). See also *Belmar* v. *Barkalow*, 67 N. J. L. 504; *Combs* v. *Lakewood*, 68 *Id.* 582; *Atlantic City* v. *Brown*, 72 *Id.* 207, and *Irwin* v. *Atlantic City*, 90 *Id.* 99.

It is equally clear that the contract between the prosecutor and the railroad company did not deprive the town of the power which it had to enact the ordinance in question and to regulate traffic on the driveway. As we have pointed out, the public generally had the right to use the driveway in question, and the town had authority, not only by virtue of its police power, but by express grant from the railroad company owning the fee, to regulate traffic thereon. The town had power to enact the ordinance, even though the company, before the passage thereof, had granted to the prosecutor, a taxicab man, the exclusive right to solicit business on its station grounds, and the exclusive privilege of parking vehicles at the place in question. Such ordinances (no question of lack of notice to the prosecutor being raised) does not deprive the prosecutor of his property without due process of law, nor take his property for public use without just compensation, nor deny him the equal protection of the laws. Avowedly, the ordinance was enacted in the exercise of the police power. Every citizen holds his property subject to the proper exercise of this power, either by the legislature directly or by public or municipal corporations to which the legislature may delegate it. It is well settled that laws and regulations of this character, relating to the comfort, health,

convenience, good order and general walfare of the inhabitants, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria,* or, in theory of the law, he is compensated for it by his sharing the general benefits which the regulations are intended and calculated to secure. *Dill. Mun. Corp.* 555, § 301; *Munn* v. *Illinois,* 94 U. S. 113. The question here is not precisely the right of the railroad company to make the contract with the prosecutor for the exclusive parking privilege. The prosecutor relies mainly upon the case of *Thompson's Express Co.* v. *Mount,* 91 N. J. Eq. 497. But that case is not in point. There the only part of the railroad company's property which was involved was the platform of the Lakewood station, upon which no one had a right other than passengers or others having business with the railroad; whereas, here, the public generally have the right to use the driveway. Whatever right may have been conferred upon the prosecutor by his contract with the railroad company, such contract must be deemed to have been entered into in view of, and in subordination to, the right of the town authorities to exercise the power to regulate traffic. The law silently incorporates itself into the contract of the parties. They could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate traffic, nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The more reasonable presumption is that it was intended that any unlimited parking privileges conferred should not endure if they came in conflict with the regulations ordained by the town authorities in the valid exercise of a power intended for the promotion of good order, and deemed necessary for the public benefit. *Lindsey* v. *Anniston,* 104 Ala. 257; 16 So. Rep. 545; *Seattle* v. *Hurst,* 97 Pac. Rep. 454.

The writ will be dismissed, with costs.

The following is a copy of the report of the affirmance of the case of *Welsh* v. *Morristown*, 98 N. J. Law, 630, as reported *sub nom Welsh* v. *Potts*, 99 N. J. Law, 528.

"COURT OF ERRORS AND APPEALS.

LaClare L. Welsh, Appellant, v. Clyde Potts et al. Respondents.

Argued December 7, 1923—Decided April 11, 1924.

On appeal from the Supreme Court, whose opinion is reported in 98 N. J. L. 630, *sub nom. Welsh* v. *Morristown.*

For the appellant, *Congleton, Stallman & Hoover.*

For the respondents, *Nathaniel C. Toms and Conover English.*

Per Curiam.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Trenchard in the Supreme Court.

For affirmance—The Chief Justice, Minturn, Kalisch, Black, Campbell, Gardner, Van Buskirk, *JJ.* 7.

For reversal—Katzenbach, Clark, *JJ.* 2."

Respectfully submitted,

Conover English,
N. C. Toms,
Counsel for Respondent,
The Town of Morristown.

SUBJECT INDEX.

	PAGE
Statement of the Case	1
Material Parts of the Elevation Contract	3
Answer to Petitioner's Point I	5
The establishment of the parking place on the driveway was justified under the police power and the terms of the Elevation Contract	5
The parties to the suit have construed the Contract by their conduct	11
The ordinance does not contravene the Fourteenth Amendment, because the lands taken are devoted to a public use	12
Answering Petitioner's Point II	16
The ordinance does not construe the Elevation Contract as a grant of a public easement	16

TABLE OF CASES CITED.

	PAGE
Chicago &c. R. R. *v.* Nebraska, 170 U. S. 57	13
City of Chillicothe *v.* Brown, 38 Mo. Appeals, 609	15
City of Emporia *v.* Shaw, 51 Pac. Rep. 237	15
City of St. Paul *v.* Smith, 7 N. W. Rep. 734	15
City of Seattle *v.* Hurst, 97 Pac. Rep. 454	15
Clampitt *v.* Doyle, 73 N. J. Eq. 678	12
Cooley's Constitutional Limitations, 7th Ed., Ch. 16	13
Dennis *v.* Jones, 44 N. J. Eq. 513	12
Dillon's Municipal Corp'ns, Vol. 1, 5th Ed., Sec. 301	13
Donovan *v.* Pennsylvania R. R. Co., 199 U. S. 279	7
Emerson *v.* Town of McNeil, 106 S. W. Rep. 479	15
Ex Parte Vance, 62 S. W. Rep. 568	15
Faulkner *v* Wassmer, 77 N. J. Eq. 537	12
Laddonia *v.* Poor, 73 Mo. Appeals, 465	15
Lindsey *v.* Mayor &c. of Anniston, 16 So. Rep. 545	15
Masterson *v.* Short, 30 N. Y. Super. Ct. 241	8
Munn *v.* Illinois, 94 U. S. 113	7, 8, 13, 14
Producers Transportation Co. *v.* Railroad Commission, 251 U. S. 228	13
Swan *v.* Mayor &c., of Baltimore, 103 Atl. Rep. 441	7
The Taxi-cab Cases, 143 N. Y. Supp. 279	8
Thompson's Express Co. *v.* Mount, 91 N. J. Eq. 497	10
Union Dry Goods Co. *v.* Georgia, P. S. Corp., 248 U. S. 372	13
Van Dyke *v.* Anderson, 83 N. J. Eq. 568	11
Veneman *v.* Jones, 20 N. E. Rep. 644	15
Waldorf-Astoria Hotel Co. *v.* City of New York, 105 N. E. Rep. (N. Y.) 803	8
Welsh *v.* Morristown, 98 N. J. L. 630	5, 8, 10, 13, 15
Wolff Co. *v.* Industrial Court, 262 U. S. 522	8

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Petitioner,

AGAINST

THE TOWN OF MORRISTOWN, HENRY LADEN and others,

Respondents.

BRIEF OF THE TOWN OF MORRISTOWN, RESPONDENT, IN OPPOSITION TO THE PETITION AND BRIEF OF THE PETITIONER.

Statement of the Case.

The Statement contained in the Petition (p. 2) should be supplemented by the following:

Pursuant to the Elevation Contract (R. p. 315), the Railroad Company dedicated from its lands such lands as were necessary for a new street, known as Lackawanna Place, and provided all the lands necessary for the laying out and establishing of a driveway on the station grounds connecting with and continuing said Lackawanna Place, and agreed that the said driveway along the easterly side of its

tracks and under said tracks, and into Morris street, should be kept open at all times for general foot and vehicular traffic to and from the station grounds on the easterly side of the railroad, and further agreed that the town should exercise all necessary police powers in and upon the station grounds, approaches and driveways for the purpose of regulating foot and vehicular traffic at the station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto.

Immediately following the completion of the improvement under the Elevation Contract the town exercised police powers in and upon the grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic, with the knowledge and consent of the Railroad Company. It established a parking place for taxicabs and enforced its regulations with respect thereto at the very same place designated in the ordinance of October 22, 1924 (R. p. 28), and that parking place continued until the making of the contract between the railroad and Welsh, dated December 28, 1922 (R. p. 22). Prior to the adoption of the said ordinance of October 22, 1924, the police committee of the Board of Aldermen after many months of study and investigation of traffic conditions at the station plaza, was of the opinion and reported that the said hack stand should be restored, and thereupon the town, in good faith and for the purpose of regulating foot and vehicular traffic in the said driveway, for the best interests of the traveling public and of the public welfare, adopted the said ordinance.

The Town claims and has always claimed the right to exercise all necessary police powers, including the regulation of foot and vehicular traffic and the establishment and removal of hack stands on the said driveway mentioned in said ordinance, because of the provision of the Elevation Contract (R. pp. 308-322), and also because said driveway is devoted to public use and is subject to public regulation in the interests of the public welfare.

We dispute the claim made in the Petition (p. 8) as to the far-reaching effect of the decision of the Circuit Court of Appeals, because of the presence of the Elevation Contract in this case, and the facts and circumstances growing out of the existence of that contract, which at once distinguish this case from an abstract attempt on the part of a municipality to exercise unwarranted dominion over a Railroad Company's property.

Material Parts of the Elevation Contract.

The Elevation Contract was between the Town, on the one part, the Morris & Essex R. R. Co. and the D. L. & W. R. R. Co., on the other part (Exhibit C 15, R. p. 308), and was based upon mutual stipulations and agreements and provided as follows (p. 321, l. 15):

> "It is further stipulated and agreed that each and every of the acts and things to be done and performed by each of the parties hereto is essential consideration for the acts and things to be done and performed by the other party, and that each of the terms of this contract is a necessary and proper part of the work of improvement herein provided for."

It is conceded on the record that the contract was performed by both parties (R. p. 291, l. 30, and p. 292, l. 35).

By the terms of the Elevation Contract the Railroad Company agreed under the caption "New Street" (p. 315, l. 22), to lay out the driveway, where the parking place mentioned in the ordinance is now located, as follows (p. 316, l. 28):

> "The Railroad Companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway."

The contract also provided, under the caption "Passenger Station," that the Railroad Company should erect a new passenger station with a shelter house on the easterly side of the tracks, and then provided (p. 317, l. 13):

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

There is no proof in the case of any "rules and regulations" of the Railroad Companies (R. pp. 139-143, l. 15).

Following the completion of the work under the Elevation Contract, the then Mayor of Morristown, John Todd, acting under authority of an ordinance of the Town, which authorized the Mayor to designate such places as public stands for hacks, cabs, etc., as he might deem expedient and proper (Exhibit D 3, R. p. 343), after some preliminary experimenting designated as a cab stand the place along the curb of the driveway on the easterly side of the shelter house, which is the same place now designated in the ordinance of October 22, 1924. (See Todd's testimony, R. p. 337, l. 10 to p. 339, l. 10, and see the ordinance, Exhibit C 20 and D 6, pp. 28 to 31, and particularly p. 29, ll. 13 to 21.)

Mayor Todd also gave instructions to the police to enforce this regulation, which they did (p. 329, l. 15).

The Town, through its police, continued to exercise authority over the driveway and station grounds generally. No complaint or objection was made by the Railroad Company until the making of the contract between the D. L. & W. R. R. Company, and Welsh, dated December 28, 1922 (Exhibit C 16, R. pp. 22 to 27), when a controversy ensued between the railroad, the Town and the cabmen, which resulted in a variety of litigation, including this suit.

Following the making of the Contract between the Railroad Company and Welsh (R. p. 22) the Town, by ordinance,

abolished the parking place which had originally been created by Mayor Todd on the driveway in question. Thereupon Welsh, represented by the same counsel who represented the Railroad Company, in this suit, applied to the New Jersey Supreme Court for a writ of certiorari to set aside this ordinance, but the court sustained the ordinance, and the decision of the Supreme Court was affirmed by the New Jersey Court of Errors and Appeals.

See *Welsh* v. *Morristown,* 98 N. J. L. 630; affirmed on opinion sub. nom. *Welsh* v. *Potts,* 99 N. J. L. 528.

Following this decision an injunction which had previously been issued by the New Jersey Court of Chancery against the Town was dissolved and thereupon the Town passed the ordinance of October 22, 1924, restoring the parking place as it had previously been designated.

Answering Petitioner's Point I (Brief, p. 9).

The establishment of a parking place on the driveway in question was not contrary to the Fourteenth Amendment, but was justified under the police power by the public necessities, and because of the express agreement of the Railroad Company set forth in the Elevation Contract.

The Circuit Court of Appeals found that the facts fully justified the plea of the Town that the public necessities required the adoption of the ordinance of October 22, 1924, under the police power.

See the Opinion, Record p. 370.

See also the testimony of Mayor Potts, R. p. 168, ll. 20-35; p. 176, ll. 30-40; p. 199, ll. 5-35; and Chief of Police Wildey, R. p. 243, ll. 1-30.

The Circuit Court of Appeals held (R. p. 372, l. 8), that the Town "in enacting the ordinance establishing the parking place and in enforcing the same, was exercising the

police power delegated to it by the State, *and granted to it by the* (Railroad) *Company*".

There is no taking of the Railroad Company's property under the guise of regulation, as argued in Petitioner's brief (p. 10), because the regulation complained of is within the authority conferred upon the Town by the Railroad Company with respect to this very driveway, under the Elevation Contract.

Again the effect of the ordinance is not, as argued in Petitioner's brief (pp. 12-20), to enlarge the duties of the Railroad Company so as to include a taxicab service. The ordinance merely regulates traffic in the driveway, in the interests of the public having occasion to use the driveway. The Railroad Company agreed to such regulation by the Elevation Contract.

It agreed to and did provide the necessary lands and laid out the driveway, and agreed to keep it open for public travel (R. p. 316); and it further agreed that the Town should exercise all necessary police powers over the station grounds and driveways for the purpose of regulating traffic (R. p. 317).

All that the Railroad Company retained for itself under the Elevation Contract was the right of reversion in the driveway. It in effect turned over the use and control of the driveway to the Town. It provided that the legal effect of this turning over should not amount to a dedication in law, so that upon the termination of the contract the title to the land in the driveway would revert unimpaired to the Company. There is no foundation in the record for the claim (Petitioner's Brief, p. 18) that the effect of the ordinance is to make the Railroad Company a partner in the taxicab business, and the cases cited have no particular application to the facts here.

It is not disputed that under the authority of the Town's Charter and the Statutes of New Jersey, the Town had full power and authority to regulate traffic and establish parking places for public cabs in public places.

The courts have many times upheld such a right. In fact, the right arises out of immemorial custom. Thus in *Munn* v. *Illinois*, 94 U. S. 113, the court said (p. 125):

> "It has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c."

If the driveway in question were a dedicated public street there could be no doubt of the right of the Town to create a hackstand upon it, and the railroad as an abutting owner could not be heard to complain. In *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, page 303, an ordinance of the City of Chicago creating a hackstand in the public street upon which the railroad company was an abutting owner was expressly upheld, page 304.

To the same effect, see

> *Swan* v. *Mayor, &c., of Baltimore*, 103 Atl. Rep. 441 (Md. Appeals).

Now, although the fee in the land remained in the Railroad Company, nevertheless by the elevation contract it was very evidently intended that the Town should exercise all necessary police powers in and upon the station, station grounds, approaches, and driveways, for the purpose of regulating foot and vehicular traffic at the station in the broad sense of that term. This must necessarily be implied from the fact that the station is a public place which is frequented by a large number of persons, that a large amount of foot or vehicular traffic of necessity abounds at said station, and that included in the vehicular traffic is that created by the presence of public cabs.

In order to have a public cab available to persons desiring the service of a cab, there must necessarily be established some place where a cab can conveniently be found. It could not reasonably be expected that public cabs should con-

tinuously drive up and down the driveway, waiting for some passenger to hail one of them or that the passenger should be expected to stand out looking for a moving cab which he could hail.

See

Masterson v. *Short,* 30 N. Y. Super. Ct. 241; 3 Abb. Prac. Ch. S. 154;

The Taxicab Cases, 143 N. Y. Supp. 279, at p. 293;

Waldorf-Astoria Hotel Co. v. *City of New York,* 105 N. E. Rep. (N. Y.) 803, at p. 806.

Now, while the cab stand created by the ordinance of October 22, 1924, is not on a dedicated public street, it is on the driveway in question, and this is on land which is devoted to a public use, both by customary use and under the terms of the Elevation Contract, and the reasoning of the foregoing cases fully applies.

The business of driving a public cab is a business devoted to public use. So held in *Munn* v. *Illinois, supra.*

The Taxicab Cases, supra, page 289;

Wolff Co. v. *Industrial Court,* 262 U. S. 522, at p. 535.

The highest court of New Jersey affirming the State Supreme Court in the certiorari case of *Welsh* v. *Morristown,* 98 N. J. L. 630; 99 N. J. L. 528, had before it for construction this same Elevation Contract. The claim in that case, as in the case at bar, was that the ordinance there under review deprived the prosecutor of his property without due process of law and took his property for public use without compensation (98 N. J. L., p. 631). The court, after considering practically the same set of facts as is now before the court with respect to the use of the driveway, and also the language of the contract above quoted, reached the conclusion that the driveway in question was and is devoted to public

use, although the fee thereof remained in the Railroad Company. The court said (p. 632):

> "This track elevation contract also contains this broad and significant language: 'It is further agreed that the town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto.'
>
> In our opinion that is a plain declaration that the foot and vehicular traffic at the station and in the station driveways is to be regulated by the town."

The court said further (p. 633):

> "There can be no doubt that the town has power by ordinance to regulate traffic when reasonably necessary for public safety and good order. * * *
>
> "It is equally clear that the contract (R. p. 22) between the prosecutor (Welsh) and the railroad company did not deprive the town of the power which it had to enact the ordinance in question and to regulate traffic on the driveway. As we have pointed out, the public generally had the right to use the driveway in question, and the town had authority, not only by virtue of its police power, but by express grant from the railroad company owning the fee, to regulate traffic thereon. The town had power to enact the ordinance, even though the company, before the passage thereof, had granted to the prosecutor, a taxicab man, the exclusive right to solicit business on its station grounds, and the exclusive privilege of parking vehicles at the place in question. Such ordinances (no question of lack of notice to the prosecutor being raised) does not deprive the prosecutor of his property without due process of law, nor take his property for public use without just compensation, nor deny him the equal protection of the laws."

And once more, in dealing with the contract between Welsh and the Railroad Company, the court said (p. 635):

> "Whatever right may have been conferred upon the Prosecutor (Welsh) by his contract with the railroad

company, such contract must be deemed to have been entered into in view of, and in subordination to, the right of the town authorities to exercise the power to regulate traffic. The law silently incorporates itself into the contract of the parties. They could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate traffic, nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The more reasonable presumption is that it was intended that any unlimited parking privileges conferred should not endure if they came in conflict with the regulations ordained by the town authorities in the valid exercise of a power intended for the promotion of good order and deemed necessary for the public benefit. *Lindsey* v. *Anniston*, 104 Ala. 257, 16 So. Rep. 545; *Seattle* v. *Hurst*, 97 Pac. Rep. 454."

The case of *Thompson's Express Co.* v. *Mount*, 91 N. J. Eq. 497, cited in Petitioner's Brief (p. 15), is not only not in point, but was distinguished by the same Court in its later decision in *Welsh* v. *Morristown* (*supra*), where the Court said, in speaking of the *Mount* case (98 N. J. Law, at p. 634):

> "But that case is not in point. There the only part of the railroad company's property which was involved was the platform of the Lakewood station, upon which no one had a right other than passengers or others having business with the railroad; whereas, here, the public generally have the right to use the driveway."

The language of the contract must be read in the light of the conditions which it was designed to meet. Consideration must therefore be given to the fact that the place in question was a place frequented by the public, namely, the railroad station; that traffic of a public character, namely, public cabs, would make use of the driveway, bringing passengers to and taking away passengers from the station,

as well as the use by those having rights of egress to Morris street in Saw Mill Lane, so that when the agreement provided that the Town should exercise all necessary police powers for the purpose of regulating foot and vehicular traffic at the station, it must have been in the contemplation of the parties that the creation of a hackstand or parking place, at the station would be a part of the regulation of the foot and vehicular traffic which would necessarily accumulate there.

Any other view would be a narrow and restricted one which would not give full effect to the evident intention of the parties at the time the contract was made.

The parties to the suit, namely, the Railroad Company and the Town, have by their conduct over a period of ten years practically construed the contract as empowering the Town to create a parking place on the driveway in question.

There is no dispute whatever that for some ten years following the completion of the improvement, and until the present controversy began, a parking place for taxicabs had by regulation of the Town existed at the very place where the taxicab stand created by the ordinance of October 22, 1924. now is, and that this existed to the knowledge of the Railroad Company, and without any objection on its part.

This fact constitutes a most important piece of conduct evidence as showing the practical construction which the parties gave to the contract.

In *Van Dyke* v. *Anderson,* 83 N. J. Eq. 568, the Court said (p. 570):

> "Whenever a dispute arises as to the meaning of a contract, that construction which the parties themselves place upon it, and as to which they deal with each other, is, as between them, the one to be adopted and to be given by the Courts."

The courts recognize as a distinct doctrine, apart from the doctrine of laches, the doctrine of conduct evidence as precluding a party from later asserting a claim.

See:

Dennis v. *Jones*, 44 N. J. Eq. 513;
Clampitt v. *Doyle*, 73 N. J. Eq. 678;
Faulkner v. *Wassmer*, 77 N. J. Eq. 537, at p. 542.

The ordinance in question does not constitute a taking of the complainant's lands for public use without compensation or without due process of law, nor is it in contravention of the Fourteenth Amendment, because the lands taken are devoted to a public use.

A glance at the map (R. p. 21) indicates that the driveway physically runs into Lackawanna Place, so that, leaving out the question of boundary lines, it is to all intents and purposes a single street or driveway running along the easterly side of the elevation. It is all paved and curbed as one street, and it is not possible with the eye to tell where Lackawanna Place leaves off and the so-called driveway begins (R. p. 180, ll. 20 to 30).

Not only is the driveway used by persons having business with the Railroad, but it is used generally by traffic in and out of Saw Mill Lane.

Reference to the map shows Saw Mill Lane running off toward the northeast of the tracks. It is necessary to go through Saw Mill Lane in order to reach the Morristown & Erie Railroad depot, the Swift Company's beef house and a farmers' exchange (R. p. 189, ll. 25 to 40), also a lumber yard (R. p. 235, l. 15).

The result is a great deal of traffic in and out of Saw Mill Lane, some of which goes through the driveway under the Lackawanna tracks to Morris street, and some of which goes down the driveway on the easterly side of the elevation through Lackawanna Place and thence into Morris street. This traffic is both foot and vehicular (R. p. 193, l. 35; p. 235, ll. 10 to 40; p. 245, ll. 1 to 15).

Moreover, the rights of persons in and out of Saw Mill Lane is expressly recognized in the deed from the Morristown & Erie Railroad Company to the Morris & Essex Railroad Company, conveying a part of the present station grounds (R. p. 359, l. 30). That deed contains this significant language (R. p. 360, l. 16):

> "Subject, however, to any rights or right of passage thereon which may exist in favor of C. W. Ennis & Company, and the Swift Beef Company, and to the rights of the Town of Morristown, and The Morris & Essex Railroad Company, and any and all other rights, easements or claims thereof."

And see the Elevation Contract, Record, page 316, line 28, &c.

In *Welsh* v. *Morristown*, 98 N. J. Law 630; 99 N. J. Law 528, where the Court construed this same Elevation Contract, as applied to this same driveway, it held (p. 632) that the driveway "was and is devoted to public use, although the fee thereof remained in the Railroad Company".

The facts in the case at bar abundantly justify the Circuit Court of Appeals in finding as a fact that "the driveway was devoted to a public use" (R. p. 371, l. 4).

Since then the land upon which this driveway is located, although it may be private property in one sense, is, nevertheless, devoted to a public use, and as such is subject to municipal regulation under the police power inherent in the Town as a municipality.

See:

Dillon's Municipal Corp'ns, Vol. 1, 5th Ed., Sec. 301, p. 555;

Colley's Constitutional Limitations, 7th Ed. Ch. 16, p. 833;

Munn v. *Illinois*, 94 U. S. 113, at p. 125 & p. 130;

Chicago &c. R. R. v. *Nebraska*, 170 U. S. 57, at p. 72;

Union Dry Goods Co. v. *Georgia, P. S Corp*, 248 U. S. 372, at p. 376.

Producers Transportation Co. v. *Railroad Commission*, 251 U. S. 228, is very much in point. In that case the company had an operating pipe line from the oil fields to the

Pacific Coast, whereby it transported crude oil. The contention was that the pipe line was constructed solely to carry crude oil for particular producers under strictly private contracts, and that there had been no carrying for others, nor any devotion of the pipe line to public use (p. 230). The court found, however, that the pipe line was in fact devoted to a public use, and said (p. 230):

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595; *Associated Oil Co.* v. *Railroad Commission*, 176 California 518, 523, 526. And see *Munn* v. *Illinois*, 94 U. S. 113, 126; *Louisville & Nashville R. R. Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483, 495; *Weems Steamboat Co* v. *People's Steamboat Co.*, 214 U. S. 345, 357; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416, 419-420. On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulation. *Munn* v. *Illinois*, *supra*.
>
> "The state court, upon examining the evidence, concluded that the company voluntarily had devoted the pipe line to the use of the public in transporting oil."

So, too, in *Munn* v. *Illinois* (*supra*), the owner of the elevator property was held to have devoted it to a public use.

The decision fully upholds the position of the Circuit Court of Appeals in its opinion, as set forth at page 369 of the Record (criticized in the Petitioner's Brief at p. 17), that land devoted to a public use is subject to regulations.

The driveway in question, upon which the ordinance has created a cab stand, is property of the Railroad Company devoted to a public use, and as such is ruled by the same principle of law, and is subject to reasonable regulation by the municipal authorities.

The right of a Railroad Company to contract with its favorite hackman or baggage transfer man in no nanner militates against the higher power of the municipality under its police powers to regulate traffic in the interest of all the people on a public driveway.

See:

Lindsey v. *Mayor &c. of Anniston,* 16 So. Rep. 545 (Sup. Ct. Ala.);

City of Seattle v. *Hurst,* 97 Pac. Rep. 454 (Sup. Ct. Washington);

Laddonia v. *Poor,* 73 Mo. Appeals, 465;

City of Chillicothe v. *Brown,* 38 Mo. Appeals, 609;

City of St. Paul v. *Smith,* 7 N. W. Rep. 734 (Minn.);

Veneman v. *Jones,* 20 N. E. Rep. 644 (Sup. Ct. Indiana);

Ex Parte Vance, 62 S. W. Rep. 568;

City of Emporia v. *Shaw,* 51 Pac. Rep. 237 (Kaiser's Appeals);

Emerson v. *Town of McNeil,* 106 S. W. Rep. 479 (Sup. Ct. Arkansas).

The fact that a part of the driveway happens to be located on property, the fee of which is in the Railroad Company, makes no difference here, because of the provision contained in the Elevation Contract (R. pp. 315-317).

For a case directly in point, upon almost the same state of facts and the same questions of law, see:

Welsh v. *Morristown,* 98 N. J. Law 630; Affirmed on Opinion, Sub. Nom. *Welsh* v. *Potts,* 99 N. J. Law 528.

The Circuit Court of Appeals found as a fact that the lands taken are devoted to a public use (R. p. 371).

Answering Petitioner's Point II (Brief, p. 21).

The ordinance of October 22, 1924, does not, in effect, construe the contract of September 24, 1912, as a grant of a public easement.

All that the Town has ever sought to do is to regulate traffic in the driveway in the interest of the traveling public. This the Railroad Company agreed the Town should do, reserving to itself the fee in the land by providing that the contract should not be construed as a dedication of the driveway as a public highway. A dedication would have deprived the Railroad Company of the title to the land, while the reservation of the fee in no way militates against the exercise of necessary police powers in and upon the driveway for the purpose of regulating traffic.

With respect to the enforcement of the rules and regulations of the Railroad Company, the record is devoid of proof of any rules or regulations (Record, pp. 139-143).

The contract with Welsh is not a rule or regulation within the scope of the contract.

The dissenting opinion by Judge Buffington overlooks that pertinent language of the Elevation Contract which confers upon the Town, with the consent of the Railroad Company, the right to exercise all necessary police powers in and upon the driveway for the purpose of regulating foot and vehicular traffic.

We respectfully submit that the reasons for the petition, as stated therein (p. 7), are not sufficient to warrant this Court in allowing the Writ of Certiorari prayed for.

Respectfully submitted,

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INDEX.

PAGE

Supplemental statement of the case..... 1

Points on which petitioner intends to rely..... 8

Summary of the argument..... 8

Argument 9

The establishment of a parking place on the driveway in question was not contrary to the Fourteenth Amendment but was justified under the police power by the public necessities for the safety, welfare and comfort of the public using the driveway and was authorized under the express agreement of the railroad company set forth in the contract 9

POINT I. The ordinance in question does not constitute a taking of complainant's lands for public use without compensation or without due process of law, nor is it in contravention of the Fourteenth Amendment because the lands taken are devoted to a public use..... 12

(*a*) The town under its police power has power to regulate traffic by ordinance including the establishment of cab-stands 12

(*b*) Nor does the contract between Welsh and the railroad company (Exhibit C-16, R. p. 22) militate against the power of the Town to pass an ordinance to establish a cab-stand as a regulation of traffic 13

PAGE

(*c*) The lands taken are devoted to a public use. The driveway constitutes the only street approach to the easterly side of the railroad station and is so clothed with a public interest that it is subject to reasonable regulation with respect to the traffic thereon..... 18

POINT II. The Town had the right to pass the Ordinance of October 22, 1924 because of the express agreement of the railroad company set forth in the contract of 1912..... 35

(*a*) The establishment of a parking place by the ordinance of October 22, 1924 (R. p. 28) is within the terms of the contract in that it constitutes a regulation of foot and vehicular traffic at the station..... 44

(*b*) The parties to the suit, namely, the railroad company and the Town, by their conduct over a period of ten years practically have construed the contract to empower the Town to establish a parking place on the driveway in question..... 45

Conclusion 47

CASES CITED.

PAGE

Atlantic City *v.* Brown, 72 N. J. L. 207..... 13
Atlantic Coast Line *v.* Goldsboro, 232 U. S. 548....14, 18, 20, 22, 30, 32, 33

Banton *v.* Belt Line Ry., 268 U. S. 413..... 28
Belmar *v.* Barkalow, 67 N. J. L. 504..... 13
Block *v.* Hirsh, 256 U. S. 135.....11, 27, 33

Chicago &c. R. R. *v.* Nebraska, 170 U. S. 57.....11, 25, 33
City of St. Paul *v.* Smith, 7 N. W. 734..... 15
City of Seattle *v.* Hurst, 97 Pac. R. 454..... 17
Clampitt *v.* Doyle, 73 N. J. Eq. 678..... 46
Combs *v.* Lakewood, 68 N. J. L. 582..... 13

Dillon on Municipal Corporations, Vol. 3, Sec. 1167... 13
Dennis *v.* Jones, 44 N. J. Eq. 513..... 45
Donovan *v.* Penn. R. R., 199 U. S. 279..... 13, 20

Emerson *v.* Town of McNeil, 106 S. W. 479..... 15
Erwin *v.* Atlantic City, 90 N. J. L. 99..... 13
Ex Parte Barmore, 163 Pac. 50..... 17
Ex Parte Maynard, 275 S. W. 1070..... 17

F. C. Ayres Mercantile Co. *v.* Union Pac. R., 16 Fed. (2nd) 395..... 19
Faulkner *v.* Wassmer, 77 N. J. Eq. 537..... 46

Great Northern Ry. *v.* Cahill, 253 U. S. 71..... 29
Great Northern Ry. *v.* Minnesota, 238 U. S. 340..... 29

Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358.. 19, 46
Levy Leasing Co. *v.* Siegel, 258 U. S. 242..... 34
Lindsey *v.* Mayor &c. of Anniston, 16 So. Rep. 545.... 16

Masterton *v.* Short, 30 N. Y. Super. Ct. 241; 3 Abb. Prac. Rep. 5 N. S. 154..... 44
Milheim *v.* Moffat Tunnel Dist., 262 U. S. 710.....11, 19, 21
Missouri Pac. Ry. *v.* Omaha, 235 U. S. 121.....11, 19, 25
Munn *v.* Illinois, 94 U. S. 113.....11, 12, 16, 20, 32, 33, 45

PAGE

Noble State Bank *v.* Haskell, 219 U. S. 104..... 11, 31

Patsone *v.* Pennsylvania, 232 U. S. 138..... 19
Penn Coal Co. *v.* Mahon, 260 U. S. 393..... 12, 28
Pierce Oil Corp. *v.* City of Hope, 248 U. S. 498..... 18
Producers Trans. Co. *v.* Railroad Commission, 251 U. S. 228.....11, 26, 33

Reinman *v.* Little Rock, 237 U. S. 171..... 18

St. Louis Poster Adv. Co. *v.* St. Louis, 249 U. S. 269. 18
Swan *v.* Mayor, &c. of Baltimore, 103 Atl. Rep. 441. 13

The Taxicab Cases, 143 N. Y. Supp. 279..... 44, 45
Thompson's Express & Storage Co. *v.* Mount, 91 N. J. Eq. 497.....13, 14, 42

Union Dry-Goods Co. *v.* Georgia Public Service Corporation, 248 U. S. 372.....11, 26, 33

Van Dyke *v.* Anderson, 83 N. J. Eq. 568..... 46
Van Dyke *v.* Geary, 244 U. S. 39..... 11

Waldorf-Astoria Hotel Co. *v.* City of New York, 105 N. E. 803..... 44
Welch *v.* Swasey, 214 U. S. 91..... 19
Welsh *v.* Morristown, 98 N. J. Law, 630.....11, 13, 14, 19, 41, 42, 45
Williams *v.* Arkansas, 217 U. S. 79..... 17, 18
Wolff Co. *v.* Industrial Court, 262 U. S. 522....28, 32, 33, 45,

IN THE

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Petitioner,

vs.

THE TOWN OF MORRISTOWN, HENRY LADEN and others, Respondents.

October Term, 1927.

No. 147.

BRIEF FOR RESPONDENT, THE TOWN OF MORRISTOWN.

Supplemental Statement of the Case.

The facts of this case are so material to the questions of law involved that the "Statement of the Case" in Petitioner's Brief (p. 2) should be supplemented as follows:

The map, which is a part of the record (R. p. 21), shows that the railroad tracks run roughly north and south. The main station building is on the west side of the tracks. On the east side is a platform, roofed over, which constitutes the so-called shelter house. The platform and tracks are elevated.

A driveway starts from Morris street and runs under the tracks north of the station, and from there runs southerly along the easterly retaining wall and shelter house. This driveway runs into and becomes a part of Lackawanna Place, which continues southerly and alongside of the easterly retaining wall until it runs into Morris street south of the station.

Passengers from New York and points east alight from the trains on the elevation, go downstairs and approach the driveway through a tunnel under the elevation platform. This tunnel comes out on the driveway, north of where the driveway becomes Lackawanna Place.

Prior to the making of the contract between the Railroad Company and the Town in 1912, the tracks were at grade and were elevated as the result of this contract.

The Elevation Contract was between the Town, on the one part, the Morris & Essex R. R. Co. and the D. L. & W. R. R. Co. on the other part (Exhibit C-15, R. p. 308), and was based upon mutual stipulations and agreements and provided as follows (R. p. 321, l. 15):

> "It is further stipulated and agreed that each and every of the acts and things to be done and performed by each of the parties hereto is essential consideration for the acts and things to be done and performed by the other party, and that each of the terms of this contract is a necessary and proper part of the work of improvement herein provided for."

It is conceded on the record that the contract was performed by both parties (R. p. 291, l. 30, and p. 292, l. 35).

By the terms of the Elevation Contract the Railroad Company agreed in Article VI under the caption "New street" (R. p. 315, l. 22), to lay out the driveway, where the parking place mentioned in the ordinance is now located, as follows (R. p. 316, l. 28):

> "The Railroad Companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway."

The contract also provided, in Article VII, under the caption "Passenger Station," that the Railroad Company

should erect a new passenger station with a shelter house on the easterly side of the tracks, and then provided (R. p. 317, l. 13):

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

There is no proof in the case of any "rules and regulations" of the Railroad Companies (R. pp. 139-143, l. 15).

Following the completion of the work under the Elevation Contract, the then Mayor of Morristown, John Todd, acting under authority of an ordinance of the Town, which authorized the Mayor to designate such places as public stands for hacks, cabs, etc., as he might deem expedient and proper (Exhibit D 3, R. p. 343), after some preliminary experimenting designated as a cab stand the place along the curb of the driveway on the easterly side of the shelter house, which is the same place as is now designated in the ordinance of October 22, 1924, attacked in this suit (see Todd's testimony, R. p. 337, l. 10 to p. 339, l. 10, and see the ordinance, Exhibits C-20 and D-6, R. pp. 28 to 31, and particularly p. 29, ll. 13 to 21).

Mayor Todd also gave instructions to the police to enforce this regulation, which they did (R. p. 329, l. 15).

The Town, through its police officers, continued to exercise authority over the driveway and station grounds generally until the making of the contract between the D. L. & W. R. R. Company, and Welsh, dated December 28, 1922 (Exhibit C-16, R. pp. 22 to 27), when a controversy ensued between the railroad, the Town and the cabmen, which resulted in a variety of litigation, including this suit.

The contract which the Railroad Company made with Welsh created him the Railroad Company's favorite cabman and gave him the exclusive right to solicit business as a cab-

man on the station grounds; the exclusive privilege of installing a cab stand with telephone facilities in the station, and the exclusive privilege of parking his vehicles in the driveway along the easterly wall in the same place, which is now designated by the ordinance of October 22, 1924 (see the contract, Exhibit C-16, R. p. 23, ll. 1 to 20; p. 127, l. 24; p. 136, l. 10; p. 234, l. 30).

Following the making of the contract with Welsh, and in January, 1923 (R. p. 165, l. 35; p. 360, l. 26), the railroad filed its bill and obtained an injunction from the New Jersey Court of Chancery, enjoining the public cabmen from parking their cars on the driveway.

Thereupon the Town, in order to provide a parking place for the public cabmen, established a parking place for them on Lackawanna Place, a few yards south of, and a physical continuation of, the driveway in question and on the same east side of the elevation, and an ordinance was thereafter passed establishing that place as a public hack stand (R. p. 346, l. 20).

By an ordinance passed February 7, 1923 (Exhibit C-19, R. p. 325, and Exhibit D-4, R. p. 344), and following the Chancery injunction, the Town abolished the parking place which had originally been created by Mayor Todd on the driveway in question. This avoided any "head on" meeting of the public cabs with Welsh's cabs (Petitioner's Brief, p. 4). A further result of this was that Welsh was unable to longer park his cabs on this driveway without incurring the penalty prescribed in the ordinance. Welsh thereupon applied to the New Jersey Supreme Court for a writ of certiorari to set aside this ordinance, but the court sustained the ordinance, and the decision of the Supreme Court was affirmed by the New Jersey Court of Errors and Appeals.

> See *Welsh* v. *Morristown*, 98 N. J. L. 630; affirmed on opinion sub. nom. *Welsh* v. *Potts*, 99 N. J. L. 528.

As a result of the decision in that case the injunction which had issued out of the New Jersey Court of Chancery

was dissolved (R. p. 101), and the Town was again free to deal with the traffic problem at the station plaza.

By this time it was demonstrated that the removal of the hack stand to Lackawanna Place did not work satisfactorily.

The traffic conditions at the station were the subject of careful study by Mayor Potts and the Chief of Police (R. p. 167, ll. 20 to 35, and p. 242, l. 40); also by the police committee of the Board of Aldermen (R. p. 110, l. 16, and p. 243, l. 3). They found that the new parking place was not as convenient as the old one had been and there were many complaints (R. p. 107, ll. 35 to 40). And in bad and rainy weather it constituted a menace to health (R. p. 168, l. 27, and p. 243, l. 25). A large number of commuters petitioned the Town to restore the cab-stand to the place on the driveway where it had always been since the elevation of the tracks.

Accordingly and in the interest of the safety, welfare and comfort of the public using the driveway the ordinance of October 22nd, 1924, was adopted.

The effect of that ordinance was to restore the public cabmen, as well as Welsh, to the cab stand on the driveway, and the public cabmen remained there until restrained by the injunction of the District Court.

The confusion at the loading point mentioned in Petitioner's brief (p. 4) is the result of the injunction in the instant case, which makes necessary the continuance of a cab stand on Lackawanna Place for the public cabmen, and is no fault of the Town.

The preamble to the ordinance of October 22, 1924, re-establishing the public hack stand in the driveway reads as follows (R. p. 28):

> "AN ORDINANCE RELATING TO TRAFFIC ON THE DRIVE WAY LYING ON THE EAST SIDE OF THE LACKAWANNA DEPOT IN THE TOWN OF MORRISTOWN, ESTABLISHING ADDITIONAL HACKSTAND AND REGULATING PARKING AND HACKING.
>
> WHEREAS, this governing body has received petitions from over three hundred commuters and patrons of the

Delaware, Lackawanna & Western Railroad, asking that the public hack stand for West bound trains be restored to its former place where it stood for so many years; and it appearing from said petitions and from the report of the Police Committee upon the same that the present stand is inconvenient and in rainy inclement weather adds greatly to the discomfort of, and in the opinion of the Committee constitutes a menace to the health and safety of the traveling public, and particularly so in winter weather, and that numerous complaints other than the said petitions have been received by the Committee from the traveling public, of the inconvenience and discomfort by reason of the present arrangement and the Committee, after an investigation and study of the conditions during the past twenty months, recommending as a matter of better traffic regulation and in order to prevent inconvenience and discomfort to the traveling public and to protect their health and safety, that the said change be made; and this governing body concurring in the recommendations of the Committee and being of the opinion that a change should be made establishing said hack stand at its said former place and making other changes in the traffic regulations at the station;" * * *

Mayor Potts testified (R. p. 168, l. 20):

"* * * what did you do following the lifting of that Chancery injunction? A. The police committee had a conference and decided after 14 or 15 months of trial with the cab stand on Lackawanna Place it was not as desirable a place to have the cabs stand while they were waiting for their fares, that it was inconvenient to the traveling public, and in rainy and bad weather it constituted a menace to their health, and therefore they recommended to the Board that the taxicab stand be moved back to the place it had occupied for some ten or twelve years, and recommended the passage of an ordinance fixing that as a stand where the cabs waiting for fares could wait."

Mr. Coggeshall, a member of the Board of Aldermen and of the Police Committee of the Board (R. p. 104, l. 10), testified that the parking of cabs on Lackawanna place inter-

fered with traffic conditions at the station and made it more difficult in wet weather (R. p. 111, ll. 1 to 8).

Chief of Police Wildey testified that after a study of the situation, in conjunction with the Board of Aldermen and the Mayor, and from the experience which they had had with the traffic problem, the best place for the location of a hack stand was at the point designated by the ordinance, on the driveway in question (R. p. 243, ll. 1 to 30).

The ordinance did more than merely establish the hackstand in the driveway; it carefully safe-guarded the rights of the railroad with respect to any crowding on the sidewalks or entrances to the station building It provided (R. p. 30, l. 10):

> "nor shall the owner or driver of such vehicle awaiting employment at any designated stand leave the said vehicle, nor shall he move the same from the designated stand to take a passenger or passengers until summoned therefor, either by said passenger or passengers or by an officer of the Town charged with that duty, nor shall he solicit custom for any such vehicle awaiting employment when away or off from said hack stand. No owner or driver of any such vehicle while awaiting employment or otherwise, shall solicit custom in any noisy, persistent or offensive manner, nor use indecent or profane language, nor be guilty of boisterous talking or shouting or any disorderly conduct; nor vex or annoy travellers or citizens, nor at any time employ or permit any other person to ask or solicit said custom."

The great preponderance of proof was that this last provision of the ordinance was observed by the cabmen See testimony of cabmen as follows: *Durling,* R. p. 256, ll. 1-10; *Laden,* R. p. 269, l. 10; *Tanner,* R. p. 275; *Bracey,* R. p. 285; and Chief of Police Wildey, R. p. 249, ll. 20-30.

Points Upon which Respondent Intends to Rely.

The establishment of a parking place on the driveway in question was not contrary to the Fourteenth Amendment but was justified under the police power by the public necessities for the safety, welfare and comfort of the public using the driveway, because,

(I) the driveway constitutes property which is devoted to a public use; and was further justified, because,

(II) the regulation of traffic on the driveway by the Town is authorized by the contract of 1912 between the railroad company and the Town, and the establishment of a parking place on the driveway was acquiesced in by the Town for many years.

Summary of the Argument.

The ordinance creating the parking place does not constitute a taking of the petitioner's property contrary to the Fourteenth Amendment. "Since the property is devoted to a public use it is liable to be controlled for the public good." Under its police powers as a municipality and by virtue of the statutes in New Jersey the Town has power to regulate traffic by ordinance including the establishment of cab-stands. This power is not infringed by the existence of the contract between Welsh and the railroad company creating Welsh the company's favorite cabman. The determination of the local municipal authorities as to the necessity of the parking place is entitled to great consideration by this court. The fact that the railroad company retains the fee to the land in the driveway does not constitute the regulation of traffic on the driveway by the Town a taking of its property under the facts and circumstances of this case.

Furthermore, the railroad by its contract conferred authority on the Town to regulate traffic in the driveway. The establishment of a parking place is a regulation of traffic. The railroad through a long period of years has recognized and acquiesced in such regulation, and to the establishment of a cab stand on the *locus in quo*.

ARGUMENT.

The establishment of a parking place on the driveway in question was not contrary to the Fourteenth Amendment, but was justified under the police power by the public necessities for the safety, welfare and comfort of the public using the driveway and was authorized under the express agreement of the Railroad Company set forth in the contract.

This is our fundamental proposition as applied to the facts of this case.

The Circuit Court of Appeals found that the facts fully justified the plea of the Town that the public necessities required the adoption of the ordinance of October 22, 1924, under the police power.

> See the Opinion, R. p. 370.
>
> See also the testimony of Mayor Potts, R. p. 168, ll. 20-35; p. 176, ll. 30-40; p. 199, ll. 5-35; and Chief of Police Wildey, R. p. 243, ll. 1-30.

The Circuit Court of Appeals held (R. p. 372, l. 8), that the Town "in enacting the ordinance establishing the parking place and in enforcing the same, was exercising the police power delegated to it by the State, and granted to it by the (Railroad) Company."

A glance at the map (R. p. 21) indicates that the driveway physically runs into Lackawanna Place, so that, leaving out the question of boundary lines, it is to all intents and purposes a single street or driveway running along the easterly side of the elevation. It is all paved and curbed as one street, and it is not possible with the eye to tell where Lackawanna Place leaves off and the so-called driveway begins (R. p. 180, ll. 20 to 30). This statement of the situation does

not ignore the important fact of boundary lines (Petitioner's Brief, p. 27) which are admitted to exist: it merely emphasizes the other important fact, that regardless of boundary lines this driveway has all the physical characteristics and use of a public street. 3,000 people patronize the railroad station daily (R. p. 7), and at times the driveway is crowded with traffic (R. p. 370, l. 30).

Not only is the driveway used by persons having business with the Railroad, but it is used generally by traffic in and out of Saw Mill Lane.

Reference to the map shows Saw Mill Lane running off toward the northeast of the tracks. It is necessary to go through Saw Mill Lane in order to reach the Morristown & Erie Railroad depot, the Swift Company's beef house and a farmers' exchange (R. p. 189, ll. 25 to 40), also a lumber yard (R. p. 235, l. 15).

The result is a great deal of traffic in and out of Saw Mill Lane, some of which goes through the driveway under the Lackawanna tracks to Morris street, and some of which goes down the driveway on the easterly side of the elevation through Lackawanna Place and thence into Morris street. This traffic is both foot and vehicular (R. p. 193, l. 35; p. 235, ll. 10 to 40; p. 245, ll. 1 to 15).

It may be, as Petitioner's Brief argues (p. 32), that the language of Article VI of the contract, which mentions the use of the driveway by those "now having right of egress to Morris Street in Saw Mill Lane" imports a private right in the driveway to those persons; but that does not alter the fact that others of the general public are, and for a long time have been, using the driveway for the purpose of going to and from the various business establishments on Saw Mill Lane.

Nor can the fact be ignored that many persons come and go every day to the railroad station. That there is a deal of traffic, and hence public user, in the driveway, is abundantly demonstrated in the Record (see testimony *Potts*, R. p. 194; *Todd*, R. p. 235; *Wildey*, R. p. 245; *Durling*, R. p. 254).

And this necessarily follows from the fact that this driveway is to all interests and purposes a public street leading to and alongside of a busy railroad station (R. p. 7, ll. 7-10).

The fact that only that part of the public having business with the railroad company and those of the public having occasion to go to and from Saw Mill Lane use this driveway, does not deprive it of its public character.

In *Van Dyke* v. *Geary*, 244 U. S. 39, this Court by Mr. Justice Brandeis said (48):

> "The fact that the service is limited to a part of the town of Miami does not prevent the water system from being a public utility."

If, as is argued in petitioner's brief (p. 11), the ordinance takes the property of the railroad, the answer is that it is not an unconstitutional taking because:

1) The property being devoted to a public use and so clothed with a public interest, is subject to reasonable regulation.

Munn v. *Illinois*, 94 U. S. 113;
Chicago, &c., R. R. v. *Nebraska*, 170 U. S. 57;
Noble State Bank v. *Haskell*, 219 U. S. 104;
Missouri Pacific Ry. v. *Omaha*, 235 U. S. 121;
Union Dry-Goods Co. v. *Georgia Public Service Corporation*, 248 U. S. 372;
Producers Transportation Co. v. *Railroad Commission*, 251 U. S. 228;
Block v. *Hirsh*, 256 U. S. 135;
Milheim v. *Moffat Tunnel Dist.*, 262 U. S. 710.

2) The railroad by its contract consented to a taking for the purpose of regulating traffic when it opened its driveway to public traffic and permitted the Town to exercise all necessary police power upon it to regulate that traffic.

Atlantic Coast Line v. *Goldsboro*, 232 U. S. 548;
Welsh v. *Morristown*, 98 N. J. Law 630.

POINT I.

The ordinance in question does not constitute a taking of the complainant's lands for public use without compensation or without due process of law, nor is it in contravention of the Fourteenth Amendment, because the lands taken are devoted to a public use.

The general rule is that property may be regulated to a certain extent to protect the public health, safety, welfare, comfort or morals from dangers threatened.

It is only when the regulation goes too far that it will be recognized as a taking.

Pennsylvania Coal Co v. *Mahon,* 260 U. S. 393, page 415.

The decisions in this court plainly intimate that each case has to depend on its own facts and circumstances.

(a) The town under its police power has power to regulate traffic by ordinance, including the establishment of cab stands.

It is not disputed that under the authority of the Town's Charter and the Statutes of New Jersey, the Town had full power and authority to regulate traffic and establish parking places for public cabs in public places.

The courts have many times upheld such a right. In fact, the right arises out of immemorial custom. Thus in *Munn* v. *Illinois,* 94 U. S. 113, the court said (p. 125):

> "It has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, *hackmen,* bakers, millers, wharfingers, innkeepers, &c."

If the driveway in question were a dedicated public street there could be no doubt of the right of the Town to create a hackstand upon it, and the railroad as an abutting owner could not be heard to complain. In *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, page 303, an ordinance of the City of Chicago creating a hackstand in the public street upon which the railroad company was an abutting owner was expressly upheld, page 304.

To the same effect, see

Swan v. *Mayor, &c., of Baltimore,* 103 Atl. Rep. 441 (Md. Appeals).

Dillon on Municipal Corporation, Vol. 3 (5th Ed.), Sec. 1167.

In this connnection it may be observed that the courts of New Jersey fully uphold the authority of a municipality to enact ordinances to license and regulate cabmen, regulate traffic, specify parking places and the like.

See

Belmar v. *Barkalow,* 67 N. J. Law 504, page 505;
Combs v. *Lakewood,* 68 N. J. Law 582, page 583;
Atlantic City v. *Brown,* 72 N. J. Law 207;
Erwin v. *Atlantic City,* 90 N. J. Law 99, page 101;
Welsh v. *Morristown,* 98 N. J. L. 630, page 633; affirmed 99 N. J. L. 528.

(b) Nor does the contract between Welsh and the railroad Company (Exhibit C-16, R. p. 22) militate against the power of the town to pass an ordinance to establish a cab-stand as a regulation of traffic.

We do not dispute the right of the railroad to make the contract with Welsh. Such a right has been expressly upheld by the New Jersey Court of Errors and Appeals in *Thompson's Express and Storage Co.* v. *Mount,* 91 N. J. Eq. 497, and by this Court in *Donovan* v. *Pennsylvania Co.,* 199 U. S. 279.

But the existence of that contract does not militate against the power or authority of the Town to regulate the traffic.

The highest court of New Jersey affirming the State Supreme Court in the certiorari case of *Welsh* v. *Morristown*, 98 N. J. Law, 630; 99 N. J. Law, 528, considered this very question. The Court said (98 N. J. Law, at p. 635):

> "Whatever right may have been conferred upon the Prosecutor (Welsh) by his contract with the railroad company, such contract must be deemed to have been entered into in view of, and in subordination to, the right of the town authorities to exercise the power to regulate traffic. The law silently incorporates itself into the contract of the parties. They could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate traffic, nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The more reasonable presumption is that it was intended that any unlimited parking privileges conferred should not endure if they came in conflict with the regulations ordained by the town authorities in the valid exercise of a power intended for the promotion of good order and deemed necessary for the public benefit. *Lindsey* v. *Anniston*, 104 Ala. 257, 16 So. Rep. 545; *Seattle* v. *Hurst*, 97 Pac. Rep. 454."

The case of *Thompson's Express Co.* v. *Mount*, 91 N. J. Eq. 497, cited in Petitioner's Brief (p. 17), is not only not in point, but was distinguished by the same Court in its later decision in *Welsh* v. *Morristown* (*supra*), where the Court said, in speaking of the *Mount* case (98 N. J. Law, at p. 634):

> "But that case is not in point. There the only part of the railroad company's property which was involved was the platform of the Lakewood station, upon which no one had a right other than passengers or others having business with the railroad; whereas, here, the public generally have the right to use the driveway."

The authorities generally uphold the right of a municipality, under the police power, to regulate with respect

to the location and conduct of hackmen, transfer agents and the like, notwithstanding these regulations run counter to contracts made between the railroad company and its favorite hackman or baggage transfer man, or that they to some degree interfere with the rights of the railroad company in its property.

In *Emerson* v. *Town of McNeil,* 106 S. W. (Sup. Ct. of Ark.) 479, the ordinance prohibited the soliciting of custom or patronage for any hotel or hack line on the "gravel platform belonging to the railroad company" (p. 479). The court sustained the ordinance, saying (p. 480):

> "The power conferred and as exercised is not obnoxious to, or an interference with any common right, but is a proper exercise of the police power, and is universally sustained. McQuillan on Municipal Ordinances, Sections 28, 184; *City of St. Paul* v. *Smith,* 27 Minn. 364, 7 N. W. 734, 38 Am. Rep. 296; *Veneman* v. *Jones,* 118 Ind. 41, 20 N. E. 644; 10 Am. St. Rep. 100. The fact that the platform upon which they were forbidden to solicit customers at this interval was the property of the railroad company does not affect the power. McQuillan says: 'Ordinances regulating hackmen, etc., while they are in and about landings, depots and stations, are valid, although the property of such places is not that of the city, or strictly speaking, public property of any kind." McQuillan on Municipal Ordinances, Sec. 28."

In *City of St. Paul* v. *Smith,* 7 N. W. (Minn.) 734, the ordinance provided that no hackman should park his hack on any street or public grounds adjacent to any railroad or railway depot except on designated places. The court said (p. 735):

> "The fact that the ground about the depots or stations where these ordinances are to be enforced is not the property of the city, or public property of any kind, strictly speaking, is not important. The fact that it is commonly used by hackmen in their business, for the purposes mentioned in the ordinances, is sufficient."

A well-considered case is *Lindsey* v. *Mayor, etc., of Anniston,* 16 Southern Reporter (Sup. Ct. Alabama), 545, where an ordinance provided that no hackman, agent of any transfer company or hotel proprietor should go within the depot of the railroad for the purpose of soliciting patronage for his hack, transfer company or hotel (p. 546).

A contract founded on a valuable consideration between the transfer company and the railroad, gave Lindsey as an employee of the transfer company the privilege of soliciting baggage within the Union Depot (p. 545). Lindsey was convicted under the ordinance and his conviction affirmed. The court commented on the power of the city under its charter to prescribe rules according to which the business of hackmen may be regulated, citing *Munn* v. *Illinois,* 94 U. S. 113, and 1 *Dillon Municipal Corporations*, § 328, and referring to the contract between the transfer company and the railroad, said (p. 546):

> "The contract, whatever may be its objects, or whatever may be the rights it confers, or it was intended to confer, must be deemed to have been entered into in view of and in subordination to the powers of the municipal authorities to exercise the power to regulate the business and employment of hackmen. *Knoxville Corp.* v. *Bird,* 12 Lea. 121."

And the Court concluded (p. 547):

> "the ordinance is a valid exercise of the power with which the municipal authorities were clothed; a power intended for the protection of the public and the promotion of good order, and its exercise deemed necessary for the public benefit. If thereby pre-existing private rights are restrained or limited, the restraint or limitation is *damnum absque injuria.* I Dill. Mun.Corp., Sec. 141; *Vanderbilt* v. *Adams,* 7 Cow. 349. The individual shares in and public benefit which it is intended to promote, and this is the compensation deemed by the law adequate."

In *City of Seattle* v. *Hurst*, 97 Pac. Rep. (Sup. Ct. of Washington) 454. There was a contract between the transfer company and the railway company, based on a valuable consideration, which contained recitals very similar to those in the contract between Welsh and the railroad company in the case at bar (p. 11), and gave the transfer company the exclusive right and privilege to enter upon the trains of the railroad company approaching Seattle and into the said depot and train shed and to solicit and contract with passengers for the transfer of their baggage.

The contention of the appellant and the court's position thereon was stated by the court as follows (p. 456):

> "It is argued by the appellant, at length, that the King Street Station or Union Depot is the property of the Great Northern Railway Company, and as such is to be deemed in every legal sense private property of the railway company as between itself and those of the general public who have no occasion to use the depot for purposes of transportation, and that it is lawful for the railway or depot company to make a contract granting special privileges to certain persons for supplying passengers with hacks or conveyances or baggage transfer. Many cases are cited to support that position. * * *; but that position is not the controlling question in this case. It may be conceded that the depot is the private property of the railway company, and that the railway company may grant special privileges therein. But this case, in our opinion, depends upon the validity of the ordinance."

And see to the same general effect *Williams* v. *Arkansas*, 217 U. S. 79, and *Ex Parte Barmore*, 163 Pac. Rep. (Cal.) 50, and *Ex Parte Maynard*, 275 S. W. Rep. (Texas) 1070, in both of which many cases are cited.

(c) The lands taken are devoted to a public use. The driveway constitutes the only street approach to the easterly side of the railroad station and is so clothed with a public interest that it is subject to reasonable regulation with respect to the traffic thereon.

Questions of the public health or safety are paramount to contract rights. See *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, page 501; *St. Louis Poster Adv. Co.* v. *St. Louis*, 249 U. S. 269, page 274; *Williams* v. *Arkansas*, 217 U. S. 79, p. 89.

And where property is clothed with a public interest or devoted to a public use, it is liable to be controlled for the public good.

The Circuit Court of Appeals held that the regulation for the establishment of the cab-stand in the resolution of October 22nd, 1924 was imposed to protect the public safety (R. p. 370, ll. 10-25). No attack was made upon the place designated for the cab-stand as an unreasonable place nor is the ordinance attacked as an unreasonable exercise of police power (R. p. 370, l. 25).

(1) The ordinance was passed pursuant to authority delegated to the Town by the Legislature of the State and as such it is a State law within the meaning of the Constitution.

In *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, this court, by Mr. Justice Pitney, said, page 555:

> "A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a state law within the meaning of the Federal Constitution. *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18, 31; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, 590; *Grand Trunk Ry.* v. *Indiana R. R. Comm.*, 221 U. S. 400, 403; *Ross* v. *Oregon*, 227 U. S. 150, 162."

See to the same effect *Reinman* v. *Little Rock*, 237 U. S. 171, page 176.

(2) This court, while not bound to do so, is accustomed to defer a good deal to the tribunal on the spot.

See *Welch* v. *Swasey,* 214 U. S. 91, p. 106, where the ordinance involved the question of the height of buildings.

Laurel Hill Cemetery v. *San Francisco,* 216 U. S. 358, p. 365, where an ordinance forbidding burials within the city limits of San Francisco was involved.

Patsone v. *Pennsylvania,* 232 U. S. 138, p. 144, where the question was as to the validity of an act making it unlawful for an alien to own or possess a shotgun or rifle.

In *Welsh* v. *Morristown,* 98 N. J. Law, 630; 99 N. J. Law, 528, the State Court, dealing with the same identical driveway, as here, held (98 N. J. Law, at p. 632) that

> "the driveway in question was and is devoted to public use, although the fee thereof remained in the railroad company."

And this Court in *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710, said, at page 719:

> "The test of the public character of an improvement is the use to which it is to be put, not the person by whom it is to be operated. See *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.,* 240 U. S. 30, 32."

See also *F. C. Ayres Mercantile Co.* v. *Union Pac. R. Co.,* 16 Fed. (2nd) 395, p. 397.

(3) The ordinance was passed in the interest of the public welfare, the driveway being devoted to a public use.

In *Missouri Pacific Railway* v. *Omaha,* 235 U. S. 121, the question was whether the requirement that the railroad at its own expense should construct a viaduct over and across its line of railway for the foot and vehicular traffic of the City was contrary to the due process provision of the 14th amendment. This court said (p. 129):

> "The safety of the travelling public is the primary consideration."

And again, at page 131, this court said:

> "The local authorities are presumed to have knowledge of local conditions and to have been induced by competent reasons to take the action which they did."

All that is sought by the ordinance in question here is to so regulate the traffic at the station as to protect the safety, health, good order, comfort and general welfare of the travelling public having occasion to use the railroad station.

> *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, p. 558.

In *Munn* v. *Illinois,* 94 U. S. 113, this Court by Chief Justice Waite said (bottom p. 125):

> "Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris,* 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use but, so long as he maintains the use, he must submit to the control."

In *Donovan* v. *Pennsylvania Company,* 199 U. S. 279, this Court said (p. 292):

> "In *Olcott* v. *The Supervisors,* 16 Wall. 678, 694, 695, it was adjudged that a railroad, whether constructed by a private corporation or by individuals under the authority of a legislative grant, or by the State itself, was a public highway, and that the function performed by

the corporation was that of the State, and the uses to which its property was devoted were of a public nature. In *Queensbury* v. *Culver,* 19 Wall. 83, 91, it was said that the construction or maintenance of a public highway was 'for the promotion of a public use.' So in *Township of Pine Grove* v. *Talcott,* 19 Wall. 666, 676, which involved the validity of taxation, under legislative authority, to aid in the construction of a railroad by a corporation: 'Though the corporation was private, its work was public, as much so as if it were to be constructed by the State.' Again in *Cherokee Nation* v. *Kansas Railway Co.,* 135 U. S. 641, 657: 'The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. It is because it is a public highway, and subject to such control that the corporation by which it is conconstructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner in the mode prescribed by law.' To the same effect are *United States* v. *Freight Association,* 166 U. S. 290, 332; *Smyth* v. *Ames,* 169 U. S. 466, 544; *Lake Shore, &c. Ry.* v. *Ohio,* 173 U. S. 285, 301. *Necessarily, the same principles apply in reference to the use of the Company's station house and depot grounds; for they are held in the same right as are its road,* its locomotives and other property or appliances employed in the transportation of passengers and freight, *and must be devoted primarily to public use to the extent necessray for the public objects intended to be accomplished by the construction and maintenance of the railroad as a highway."*

In *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710, the allegations, *inter alia,* were (p. 715) that the tunnel was not intended as a public highway for the use of the general public but for the benefit of the Moffat Road. This court said (p. 717):

"1. *Public Purpose.* The nature of a use whether public or private, is ultimately a judicial question. However, the determination of this question is influ-

enced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State. *Rindge Co.* v. *Los Angeles, ante,* 700, and cases therein cited. And like respect should be accorded to the declarations of the legislative body of the State. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 160. Here the legislature, familiar with the local conditions, has declared that the construction of the tunnel will benefit the people of the State; and both the local court of the State and its Supreme Court have held its construction to be for a public purpose."

In *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, the railroad had acquired a strip of land 130 feet wide on which were laid railroad tracks. As stated in the opinion (p. 551):

"The town naturally grew along the railroad, and the right of way, so far as not occupied by the tracks, was and still is used for the ordinary purposes of a street, without objection by plaintiff in error or its predecessors in title. In laying out the town, this right of way was designated as a street 130 feet wide; the portion lying east of the tracks being designated as East Center Street, the portion on the west of the tracks as West Center Street."

Cross streets were laid out, and the portion between the cross streets, Ash and Spruce Streets, four blocks, was in the heart of the City.

The Town adopted a series of ordinances designed to limit the use of the tracks with respect to the speed of trains, shifting of cars, standing of cars and also requiring the railroad to lower the tracks so as to make them conform to the grade-line of the streets. The judgment of the State Court upholding the ordinances was affirmed. This Court, by Mr. Justice Pitney, said (p. 557):

"And we are not at present particularly concerned with either contract or property rights, except as they may

serve to show the conditions under which the ordinances were adopted, and may bear upon the question of the reasonableness of those regulations. These have to do with the use and control of the property, rather than with its ownership; with the mode in which the franchise shall be enjoyed, rather than with its scope. Conceding, for argument's sake only, the utmost that may be claimed as to the charter and property rights of plaintiff in error, we still have yielded nothing that may defeat the exercise of the police power by the State, or by its authorized agency. *Adopting the extreme assumption that the railroad company has still a complete and unqualified ownership of every portion of the strip of land that was originally acquired in fee simple, and as proprietor might lawfully exercise its dominion by excluding the public from it; yet it does not do this, but permits, and long has permitted, the public to use material portions of the strip for ordinary street purposes;* it apparently excludes the public from no portion except as the existence of the tracks and the passage of trains may have such a tendency or effect. *And thus the Company, at least for the time, devotes its property in part to public uses* that are more or less inconsistent with the railroad uses, and under conditions such as to render the railroad operations necessarily a source of danger to the public while enjoying the permitted use. Under such circumstances the State, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim *sic utere tuo ut alienum non laedas,* so far as may be requisite for the protection of the public.

For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Slaughter-House Cases,* 16 Wall. 36, 62; *Munn* v. *Illinois,* 94 U. S. 113, 125; *Beer Co.* v. *Massachusetts,* 97 U. S. 25, 33; *Mugler* v. *Kansas,* 123 U. S. 623, 667; *Crowley* v. *Christensen,* 137 U. S. 86, 89; *New York &c.*

R. R. Co. v. *Bristol,* 151 U. S. 556, 567; *Texas &c. R. R. Co.* v. *Miller,* 221 U. S. 408, 414, 415. *And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law. Chicago, Burlington &c. Railroad* v. *Chicago,* 166 U. S. 226, 255; *New Orleans Gas Co.* v. *Drainage Commissioners,* 197 U. S. 453, 462; *C., B. & Q. Ry.* v. *Drainage Commissioners,* 200 U. S. 561, 591, 592.

Of course, if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate bounds of the police power.

The ordinances now in question must be considered in view not only of the charter and property rights of plaintiff in error, but of the actual situation that has developed and now exists in Goldsboro, with the consent and long acquiescence of plaintiff in error and its predecessors in interest. A town of considerable size and importance has grown up along the line of the railroad. The strip of land 130 feet in width, so far as it is not occupied by the railroad tracks, for many years has been and still is used for the ordinary purposes of a street. The Supreme Court of North Carolina found, upon adequate evidence, that it is the main business street of the town, frequently crowded with pedestrians and vehicles; and that the operation of trains along it, notwithstanding the utmost care of the railroad company, tends to obstruct the crossings and is fraught with danger to life and property."

Both the facts and the pronouncement of the Court make that case particularly applicable to the case at bar. Whatever rights the Railroad reserved to itself in the driveway by withholding an outright legal dedication of the land in the driveway, it did and does in fact, both by the contract and by the allowance of open and notorious use of the driveway,

permit the public,—certainly that part of the public having business with the railroad and also that part of the public going in and out of Saw Mill Lane,—to use this driveway for ordinary street purposes.

By so doing the Railroad here, just as the railroad in the *Goldsboro* case, "at least for the time devotes its property in part to public uses that are more or less inconsistent with railroad uses," and so subjects its driveway to the exercise of the police power for the protection of the public.

In *Missouri Pacific Ry.* v. *Omaha,* 235 U. S. 121, the court upheld the right of the municipality acting under the authority of a state statute, to require a railroad to construct overhead crossings or viaducts at its own expense and said (p. 127):

> "This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. *Chicago, Burlington & Quincy Railway* v. *Drainage Commissioners, supra; McLean* v. *Arkansas,* 211 U. S. 539; *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548."

The court also pointed out (p. 128):

> "That the City of Omaha had power to pass an ordinance of this character in execution of the authority conferred upon it by the legislature of the State, has been determined by the highest court of the State of Nebraska, considering Chapter 12-*a,* § 128, Compiled Statutes of Nebraska, 1911. *State* v. *Union Pacific Railroad Company,* 143 N. W. Rep. 918."

And see

> *Chicago, &c., R. R.* v. *Nebraska,* 170 U. S. 57, page 72.

In *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372, this court said (p. 376):

> "In *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 558, the court said:
>
> > " 'It is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necesssary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."
>
> "And in *Rail & River Coal Co.* v. *Ohio Industrial Commission*, 236 U. S. 338, 349, the state of the law upon the subject is thus aptly described:
>
> > " 'This court has so often affirmed the right of the state in the exercise of its police power to place reasonable restraints like that here involved, upon the freedom of contract that we need only refer to some of the cases in passing.'
>
> "These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state."

In *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228, the company had an operating pipe line from the oil fields to the Pacific Coast, whereby it transported crude oil. The contention was that the pipe line was constructed solely to carry crude oil for particular producers under strictly private contracts, and that there had been no carrying for others, nor any devotion of the pipe line to public use (p. 230). The court found, however, that the pipe line was in fact devoted to a public use, and said (p. 230):

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers

under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners,* 200 U. S. 561, 593; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595; *Associated Oil Co.* v. *Railroad Commission,* 176 California, 518, 523, 526. And see *Munn* v. *Illinois,* 94 U. S. 113, 126; *Louisville & Nashville R. R. Co.* v. *West Coast Naval Stores Co.,* 198 U. S. 483, 495; *Weems Steamboat Co.* v. *People's Steamboat Co.,* 214 U. S. 345, 357; *Chicago & Northwestern Ry. Co.* v. *Ochs,* 249 U. S. 416, 419-420. On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices and subject to public regulation. *Munn* v. *Illinois, supra.*

"The state court, upon examining the evidence, concluded that the company voluntarily had devoted the pipe line to the use of the public in transporting oil."

In *Block* v. *Hirsh,* 256 U. S. 135, this court said (p. 155):

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance in *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389; irrigation, in *Clark* v. *Nash,* 198 U. S. 361; and mining, in *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest, *Mt. Vernon-Woodberry Cot-*

ton Duck Co. v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32, *and that the public interest may extend to the use of land.* They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair. See also *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110, 111."

We, of course, subscribe to all that this court said in the cases cited in petitioner's brief (pp. 20-22) but the principles enunciated in those cases and quoted in the brief are entirely consistent with the upholding of the ordinance in question here, because of the facts and circumstances in this case which are quite different from those in the cases cited.

Wolff Co. v. *Industrial Court*, 262 U. S. 522 (Petitioner's Brief p. 20), involved the validity of the Court of Industrial Relations Act of Kansas which sought by legislative fiat to declare many strictly private businesses to be clothed with a public interest in the sense that they were subject to regulation under the police power.

Banton v. *Belt Line Ry.*, 268 U. S. 413 (Petitioner's Brief, p. 22), was one of the familiar class of rate cases involving the validity of an order of the New York Public Service Commission establishing joint routes on street railways in New York City and prescribing five cents as the maximum joint fare (p. 415).

Penn. Coal Co. v. *Mahon*, 260 U. S. 393 (Petitioner's Brief, p. 22), involved the validity of a state statute forbidding the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation (p. 412). It appeared that the deed executed by the Coal Company under which the plaintiff's claim provided that the grantee took the premises with the risk and waived all claim for advantages that might arise from mining out the coal. The decision went squarely on the facts and circumstances of the case, this court saying (p. 416):

> "This is a question of degree—and, therefore, cannot be disposed of by general propositions. But we regard this as going beyond any of the decided cases in this court."

(4) Petitioner's argument (pp. 12 to 26) answered.

There is no taking of the Railroad Company's property under the guise of regulation, as argued in Petitioner's brief (p. 12), because of the devotion of the property to public use and because the regulation complained of is within the authority conferred under the contract upon the Town by the Railroad Company with respect to this very driveway, under the Contract.

The cases cited in Petitioner's brief (pp. 12 and 13) are not particularly in point, because in those cases there was no contract between the parties, or any limitation or abdication of its rights, by the Railroad, as is the case here.

Furthermore, the decisions in the cases cited in Petitioner's brief (pp. 12-13) recognized the principle for which we contend, but denied its application to the facts and circumstances of those cases.

In *Great Northern Ry.* v. *Minnesota,* 238 U. S. 340, this court said (p. 345):

> "The applicable principles were announced in *Oregon Railroad, &c. Co.* v. *Fairchild,* 224 U. S. 510, 524. A taking of railroad property under administrative regulation must 'be tested by considering whether, *in view of all the facts,* the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet.' The facts being established the question then presented is whether as matter of law they are adequate to support a finding of requisite public necessity—the mere declaration of a commission is not conclusive. *Interstate Commerce Commission* v. *Louis. & Nash. Railroad,* 227 U. S. 88, 91; *Florida East Coast Line* v. *United States,* 234 U. S. 167, 185."

And again in *Great Northern Ry.* v. *Cahill,* 253 U. S. 71, the test was stated to be (p. 72):

> "whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could lawfully be compelled to meet."

Again the effect of the ordinance is not, as argued in Petitioner's brief (pp. 14-23), to enlarge the duties of the Railroad Company so as to include a taxicab service.

As a matter of fact the Railroad has to a certain extent voluntarily enlarged its duties to include a taxi-cab service by the contract it made with Welsh (R. p. 22, 24 B). The Railroad grants special privileges to Welsh in its station, building and grounds and receives in return 10% of "the gross receipts from all business to and from said Morristown Station" (R. p. 25, l. 35).

The ordinance merely regulates traffic in the driveway, in the interests of the public having occasion to use the driveway.

If the effect of the ordinance is, as argued (Petitioner's Brief, p. 14), to require the Petitioner to furnish a specified area of land for the parking of cabs, that effect is incidental and is not the main object or design of the ordinance. The object and design of the ordinance is to protect the health, welfare and safety of those of the public using the driveway (R. p. 28). The taking of which the Petitioner complains may result, but it is not an unconstitutional taking because the driveway both by custom and by the contract has been devoted to a public use and hence is subject to the exercise of the police power.

Atlantic Coast Line v. *Goldsboro,* 232 U. S. 548, p. 557.

Nor must it be overlooked that the Railroad Company agreed to such regulation by the Contract with the Town.

It agreed to and did provide the necessary lands and laid out the driveway, and agreed to keep it open for public travel (R. p. 316); and it further agreed that the Town should exercise all necessary police powers over the station grounds and driveways for the purpose of regulating traffic (R. p. 317).

All that the Railroad Company retained for itself under the Contract was the right of reversion in the driveway. It

in effect turned over the use and control of the driveway to the Town. It provided that the legal effect of this turning over should not amount to a dedication in law, so that upon the termination of the contract the title to the land in the driveway would revert unimpaired to the Company.

Petitioner's brief (p. 17) argues that if the police power of the municipality extends to establishing a public hack-stand on a station driveway it would also extend to the establishing of a parcel-room, restaurant or other similar convenience in a railroad station.

The argument fails as applied to this case because it ignores the existence of the contract between the railroad and the Town and the further fact that as the result of that contract the railroad has permitted the public to and from the station to make use of its land to the extent of using the driveway for foot and vehicular traffic, including also those having rights of egress from Saw Mill Lane. Those facts at once distinguish this case from the imaginary one where an effort is made to impose some public convenience on private property without any reason or justification. The facts and circumstances here alter the case entirely.

Any ordinance adopted by the Town under its police power attempting to establish a parcel-room or any such thing as is supposed in the Petitioner's brief would have to stand the test of reasonableness. In the case at bar there is no claim that the ordinance establishing a cab-stand is unreasonable, as the Circuit Court of Appeals pointed out (R. p. 370, l. 26).

This argument as advanced in Petitioner's brief (p. 17) may be dismissed by a reference to what this Court, by Mr. Justice Holmes, said in reply to a similar sort of argument advanced by the plaintiff in error in *Noble State Bank* v. *Haskell*, 219 U. S. 104, at p. 112:

> "It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police

power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355."

There is no foundation in the record for the claim (Petitioner's Brief, p. 21) that the effect of the ordinance is to make the Railroad Company a partner in the taxicab business, and the cases cited have no particular application to the facts here.

It cannot be denied that the Railroad did, to a certain extent at least, turn over its driveway to the use of the public: certainly to that part of the public having business with the Railroad. In a suburban town like Morristown this was a considerable proportion of the population. The bill of complaint says the Railroad handles some 3,000 passengers a day between New York and Morristown alone (R. p. 7). The Railroad gets the benefit of the use of this driveway by those of the public who are its patrons. Having thus granted the use of the driveway to the public, or such portion of the public as have business with the Railroad, it has in effect granted to the public an interest in that use and must submit to the regulation of it by the public (in this case, the Town) for the common good.

Atlantic Coast Line v. *Goldsboro*, 232 U. S. 548.

Petitioner's brief (p. 21) argues that *Munn* v. *Illinois* (*supra*), is inapplicable because the effect of the ordinance is to establish a taxi-cab business which the railroad company has no power to discontinue at its will. It is true, as this Court pointed out in *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, page 541, that the right to discontinue the business when he chooses refutes the view that public regulation in such cases can secure continuity of a business against the owner, but this court, in the same case, also pointed out that while an ordinary producer, manufacturer or shop-keeper might sell or not sell as he likes "this feature does not necessarily exclude businesses from the class clothed with a public interest" (p. 538).

Now in the case at bar the railroad has agreed to the continued use of the driveway. It agreed that the said driveway "shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds," etc. (R. p. 316, l. 30) and by that agreement has obligated itself to keep open this driveway for traffic as long as its land is used for station purposes.

Besides that the railroad, as a common carrier, has assumed the obligation of continued service by the nature of its business and the fact that it has accepted a railroad franchise. *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, at page 543.

Petitioner's brief (p. 20) attempts to distinguish the cases from this Court cited by the Circuit Court of Appeals, namely

> *Munn* v. *Illinois,* 94 U. S. 113, at p. 125 and p. 130;
> *Chicago &c. R. R.* v. *Nebraska,* 170 U. S. 57, at p. 72;
> *Union Dry Goods Co.* v. *Georgia, P. S. Corp.,* 248 U. S. 372, at p. 376,

as dealing exclusively with rates or regulations and not involving the use of lands, and says that nothing is said in any of them in support of taking land.

We think the principles laid down in those cases fully rule the case at bar, but if other citations from this Court are needed, see

Block v. *Hirsh,* 256 U. S. 135, which related to a taking of land, namely the cellar and first floor of a building on F Street in Washington (p. 153) and this Court, by Mr. Justice Holmes, said (p. 155),

> "the public interest may extend to the use of land."

Atlantic Coast Line v. *Goldsboro,* 232 U. S. 548, page 558, where the subject matter of the taking was land of the railroad company which, like the land in the driveway here, was used as a street.

Producers Transportation Co. v. *Railroad Commission,* 251 U. S. 228, where the use of a pipe line was involved.

Levy Leasing Co. v. *Siegel*, 258 U. S. 242, where this court cited the following cases, page 247:

> "*Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527; *Welch* v. *Swasey*, 214 U. S. 91; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531; *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269; *Perley* v. *North Carolina*, 249 U. S. 510."

And then said:

> "These authorities show that from time to time for a generation, as occasion arose, this court has held that there is no such inherent difference in property in land, from that in tangible and intangible personal property, as exempts it from the operation of the police power in appropriate cases,"

Nor is the ordinance an attempted regulation of transportation on the part of the Town as argued in Petitioner's brief (p. 23).

All that the Town has ever sought to do is to regulate traffic in the driveway in the interest of those of the public having occasion to use it.

It would be stretching the supervision of the Board of Public Utility Commissioners beyond reason to say that a mere regulation of traffic on a station plaza could only be accomplished by order of the Board of Public Utility Commissioners after application to that Board.

There can be no doubt that the driveway has been and is devoted to a public use. It is subject to a public user by those of the public which go to make up the traffic, both pedestrian and vehicular, to and from the station grounds on the easterly side of the railroad since this driveway constitutes the only street approach to the station on that side, and also by those having rights of egress to Morris Street in Saw Mill Lane.

These facts create a situation with respect to the traffic problem which could only be dealt with by the municipality.

And not only so, but the railroad agreed that the Town should regulate traffic in the driveway only reserving to itself

the fee in the land by providing that the contract should not be construed as a dedication of the driveway as a public highway. A dedication in the technical legal sense would have deprived the railroad company of the title to the land, while the reservation of the fee in no way militates against the exercise of necessary police powers in and upon the driveway for the purpose of regulating traffic.

The regulation of the foot and vehicular traffic in the driveway is quite different from a regulation of transportation requiring the intervention of the Board of Public Utility Commissioners.

POINT II.

The Town had the right to pass the ordinance of October 22, 1924, because of the express agreement of the Railroad Company set forth in the contract of 1912.

Petitioner in its brief (Point II, p. 26, etc.) stresses that part of the contract relating to the driveway in question which provides: "this contract shall not be construed as a dedication of said driveway as a public highway," but seeks to refine away those other provisions of the contract which provide that (*a*) a driveway shall always be kept open for foot and vehicular traffic and that (*b*) the Town is impowered to exercise all necessary police powers in and upon the station grounds to regulate traffic.

In addition to the power which the Town has under its police powers, as a municipal corporation, to pass the ordinance in question growing out of the permitted public user of this driveway, the Town was specifically granted authority by the Railroad Companies to do the very thing the Petitioner now claims it cannot do.

The contract provided for the elevation of the Railroad Company's tracks. This involved the vacating of existing

streets, and the laying out of other streets, some on land to be furnished by the Railroad Company and some on land to be furnished by the Town.

See Paragraph VI, captioned "New Street" in the contract (R. p. 315).

In the contract it was agreed that the Town should lay out and construct a new street running along the easterly elevation wall for a distance of approximately 350 feet; and that the Railroad Company should dedicate lands owned by them, necessary for the laying out of such new street; and that the Town should at its own expense acquire all other lands necessary. It is also provided that the Railroad Company should lay out the driveway which should connect with this new street and run along the easterly elevation wall and thence at right angles under the tracks to Morris Street, and should provide all lands necessary for laying out and establishing said driveway, and that (R. p. 316, l. 28)

> "Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles, and general vehicular traffic to and from the station grounds on the easterly side of said Railroad and for the use of those now having rights of egress to Morris street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway."

In Paragraph VII of the contract, captioned "Passenger Station", it was agreed as follows (R. p. 317, l. 15):

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

Grant that the fee in the land remained in the Railroad. Grant also, the Railroad never dedicated the land in the driveway in the strict legal sense of the word "dedicate".

Nevertheless the contract by its very terms provides that the Town should exercise all necessary police powers in and upon the station, station grounds, approaches, and driveways, for the purpose of regulating foot and vehicular traffic at the station. It is not necessary to go into the question of the true construction of the words "and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto". There are no such "rules and regulations" before the court. An effort to introduce as evidence rules and regulations made after the filing of the bill, was properly overruled (R. p. 139, l. 23 to p. 143, l. 15).

It will be noticed that the parties agreed that the Town should exercise all necessary police powers over the entire station grounds, including the driveways, for the purpose (1) of regulating the foot and vehicular traffic at the station; and (2) for the enforcement of the rules and regulations of the Railroad Companies in respect thereto. These two sets of duties are not mutually exclusive; they are connected by the conjunctive "and". The Town is given authority to make use of its police powers to regulate the traffic according to its own notion on this otherwise private property, *and* it is also given authority to use its police powers to enforce any rules and regulations of the Railroad with respect thereto. Now the Railroad never made any rules or regulations with respect thereto. There is no proof of any such rules or regulations whatever, in the Record sent up.

But the existence or non-existence of rules and regulations by the Railroad, does not affect one way or the other under the contract, the power and authority of the Town to regulate the foot and vehicular traffic at the station through the exercise of its police powers.

And it is significant that no limitation whatever is placed on the authority of the Town over the Station, station grounds, approaches and driveways in the exercise of the authority conferred on it by the contract. The authority is conferred on the Town in the most sweeping manner; the language is "the Town may and shall exercise all necessary police powers".

And what may the Town do in the exercise of its police powers on these station grounds and driveways? It may regulate foot and vehicular traffic at said station: how? Necessarily in such manner as its good judgment dictates. Granting all that petitioner's brief contends for with respect to the claim that the property is private property, and that the Railroad Company never dedicated it, in the legal sense of the term "dedicate", nevertheless, the fact remains that the Railroad by the terms of Article VII of the contract voluntarily abdicated its full powers of enjoyment over its property to the extent of consenting that the driveway should always be kept open for traffic and to the further extent of conferring upon the Town the right, in the exercise of its police powers, to regulate foot and vehicular traffic on the station grounds and driveways.

These provisions of the contract cannot be ignored. They are a part of the agreement between the Railroad and the Town and must be given their proper weight in determining the rights of the parties in this driveway.

The Circuit Court of Appeals correctly construed the language of Paragraph VII (R. p. 317) of the Contract when it said (R. p. 371, l. 30):

> "This provision authorized the town to do two things: To regulate foot and vehicular traffic about the station, station grounds, approaches and driveways; and to enforce the rules and regulations of the railroad company in respect to the traffic. In performing the first duty, the town was to make its own rules and laws in accordance with which it would regulate the traffic. In doing the second, it was simply to enforce the rules and regulations made by the company. But the town had the power to make rules and regulations independently of the contract. As Mr. Justice Trenchard said in his able opinion in the case of *Welsh* v. *Morristown, supra:* 'The town had authority not only by virtue of its police powers but by express grant from the railroad company, owning the fee, to regulate traffic thereon.' "

Petitioner's brief (p. 34) argues for an interpretation of the words "police Powers" in Article VII of the contract

which is unwarranted either by the context or when considered in connection with other provisions of the contract.

(*a*) The Railroad agreed to keep the driveway open at all times for traffic.

The location of the driveway right at the station necessarily meant, as is the fact, that there would be a great deal of traffic on it.

The presence of a volume of traffic at any congested center under modern conditions in our cities implies the necessity of some regulation of that traffic.

If nothing further had been said in the contract about regulation of traffic the right to regulate might fairly have been implied from the simple fact that this driveway was, by consent of the Railroad, opened for the traffic which necessarily at times crowded in and out of the station (R. p. 7, l. 10). But the parties to the contract did not rest on any implications. They went further.

(*b*) The Railroad specifically agreed that the Town should regulate the traffic in the driveway. Petitioner's brief (p. 34) concedes that the Town had some kind of power by the agreement to regulate the foot and vehicular traffic at the station, but argues that the obligation was that of maintaining police officers at the station to regulate the traffic in accordance with the rules and regulations of the railroad company. –

This interpretation is obviously too narrow, and does not give full effect to the contract.

(1) The Railroad, over a period of over ten years, never made any rules and regulations. It would be absurd to say that under the contract the Town had no authority whatever to regulate the traffic on the driveway until the Railroad had made some rules and regulations with respect thereto to be enforced by the Town.

(2) The limitation of the words "police powers" to the mere stationing of police officers upon the property does vio-

lence to the language of the contract and evident intent of the parties.

If it had been intended that the regulation by the Town should be limited to the stationing of police officers on the ground it would have been a simple matter to have said so in the contract, and in that case the contract would have read:

> "It is further agreed that the Town *may station police officers* in and upon the station, station grounds, approaches and driveways for the purpose of regulating foot and vehicular traffic at the station."

But the contract used no such language. It used language which is much broader in its scope and intent than that. It used the word "exercise" and the words "all necessary" as bearing on the construction of the words "police powers" and provided that the Town may and shall "exercise all necessary police powers in and upon the station," etc.

It is a strained construction to limit the words as argued for in petitioner's brief. When the Railroad agreed that the Town should exercise all necessary police powers in and upon the station it did more than grant a mere permit to the Town to station a police officer on the station grounds. It may be that the Town would be exercising its police powers when it stationed an officer on the station grounds to direct the traffic but that would not be the limit of its exercise of its police powers under the language of the contract.

The term, "police powers," as applied to a municipality is well understood. A municipality may exercise its police power in a variety of ways depending on the circumstances of a given case. Here the Railroad agreed that the Town should exercise its police powers without limit for the regulation of traffic in and upon the station grounds, for it agreed that the Town should "exercise all necessary police powers" and the words "all necessary" very evidently enlarge the right of the Town to use its police powers in such manner and to such extent as was necessary in its judgment to regulate the foot and vehicular traffic at the station. This might be by station-

ing a policeman on the grounds; it might be by providing that the traffic should enter at one point and depart at another; it might be by requiring the public cabs to stand at one place or another in the driveway; it might be by a variety of ways depending on the particular traffic problem under the circumstances prevailing at the station.

The Railroad by its agreement empowered the Town to regulate the traffic at the station in its own way through the exercise of its police powers; and it also provided that it should also exercise its police powers for the enforcement of any rules and regulations of the Railroad Company with respect to the station grounds and the traffic there, if the Railroad ever formulated any such rules and regulations.

The highest court of New Jersey affirming the State Supreme Court in the certiorari case of *Welsh* v. *Morristown*, 98 N. J. L. 630; 99 N. J. L. 528, had before it for construction this same Contract. The claim in that case, as in the case at bar, was that the ordinance there under review deprived the prosecutor of his property without due process of law and took his property for public use without compensation (98 N. J. L., p. 631). The court, after considering practically the same set of facts as is now before this court with respect to the use of the driveway, and also the language of the contract above quoted, reached the conclusion (1) that the driveway in question was and is devoted to public use, although the fee thereof remained in the Railroad Company, and (2) that the contract fully empowered the Town to regulate the traffic on the driveway. The court said (p. 632):

> "This track elevation contract also contains this broad and significant language: 'It is further agreed that the town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto.'
>
> In our opinion that is a plain declaration that the foot and vehicular traffic at the station and in the station driveways is to be regulated by the town."

The court said further (p. 633):

> "There can be no doubt that the town has power by ordinance to regulate traffic when reasonably necessary for public safety and good order. * * *
>
> "As we have pointed out, the public generally had the right to use the driveway in question, and the town had authority, not only by virtue of its police power, but by express grant from the railroad company owning the fee, to regulate traffic thereon. The town had power to enact the ordinance, even though the company, before the passage thereof, had granted to the prosecutor, a taxicab man, the exclusive right to solicit business on its station grounds, and the exclusive privilege of parking vehicles at the place in question. Such ordinances (no question of lack of notice to the prosecutor being raised) does not deprive the prosecutor of his property without due process of law, nor take his property for public use without just compensation, nor deny him the equal protection of the laws."

The case of *Thompson's Express Co.* v. *Mount*, 91 N. J. Eq. 497, cited in Petitioner's Brief (p. 17), is not only not in point, but was, as we have shown, distinguished by the same Court in its later decision in *Welsh* v. *Morristown* (*supra*).

The language of the contract must be read in the light of the conditions which it was designed to meet. Consideration must therefore be given to the fact that the place in question was a place frequented by the public, namely, an approach to a railroad station, that traffic of a public character, namely, public cabs, would make use of the driveway, bringing passengers to and taking away passengers from the station, and that passengers coming in their own cars would make use of this driveway, as well as those having rights of egress to Morris street in Saw Mill Lane; so that when the agreement provided that the Town should exercise all necessary police powers for the purpose of regulating foot and vehicular traffic at the station, it must have been in the contemplation of the parties that the creation of a hackstand

or parking place at the station might very properly be a part of the regulation of the foot and vehicular traffic which would necessarily accumulate there.

Any other view would be a narrow and restricted one which would not give full effect to the evident intention of the parties at the time the contract was made.

A hackstand had been established by Mayor Todd in the driveway along the easterly elevation wall at the place indicated on the map annexed to the bill, which continued from the time of the completion of the elevation until it was abolished by the ordinance of November 7, 1923, which was enacted after the present series of litigations began. That ordinance, which abolished the hackstand, was attacked by Welsh who tried to prevent the removal of the hackstand from that place.

The ordinance of October 22, 1924 (Exhibit C to the bill, R. p. 28) is now attacked in this suit, although it re-establishes the hackstand at the same place in the driveway where the previous hackstand had been along the easterly side of the elevation wall and gives to Welsh in common with the other hack drivers of Morristown the equal right to park his cabs there.

Petitioner's argument (Point II, p. 26) seeks to escape the salient point that the Railroad Company, by the contract of September 24, 1912, specifically agreed that the Town should exercise all necessary police powers in and upon the station grounds, approaches and driveways for the purpose of regulating foot and vehicular traffic at the station.

The situation here is quite different from that where roadbed, or right-of-way of a railroad company are involved.

Cases may be cited to establish the right of a railroad company to fence off or exclude persons from its roadbed or right-of-way, but they are not in point.

The ordinary right of a railroad company to fence in its roadbed has no application here. The Railroad specifically agreed with the Town, not only not to fence off this driveway and hence exclude persons from using it, but to keep

it open at all times as a driveway not only for passengers and vehicles to and from the station grounds, but also for the use of those having rights of egress to Morris street in Saw Mill Lane. This Railroad also agreed that the Town should "exercise all necessary police powers" in and upon this driveway. The Railroad's own agreement precludes the contention now made that the Town should not exercise police powers upon this driveway.

(a) The establishment of a parking place by the ordinance of October 22, 1924 (R. p. 28), is within the terms of the contract in that it constitutes a regulation of foot and vehicular traffic at the station.

The contract (R. p. 317, l. 15) as we have seen specifically provided that the Town should exercise all necessary police powers in and upon the station and station grounds, approaches and driveway, for the purpose of regulating foot and vehicular traffic at the said station.

In order to have a public cab available to persons desiring the service of a cab, there must necessarily be established some place where a cab can conveniently be found. It could not reasonably be expected that public cabs should continuously drive up and down the driveway, waiting for some passenger to hail one of them or that the passenger should be expected to stand out looking for a moving cab which he could hail.

See

Masterson v. *Short*, 30 N. Y. Super. Ct. 241; 3 Abb. Prac. Ch. S. 154;

The Taxicab Cases, 143 N. Y. Supp. 279, at p. 293;

Waldorf-Astoria Hotel Co. v. *City of New York*, 105 N. E. Rep. (N. Y.) 803, at p. 806.

Now, while the cab stand created by the ordinance of October 22, 1924, is not on a dedicated public street, it is on

the driveway in question, and this is on land which is devoted to a public use, both by customary use and under the terms of the Elevation Contract, and the reasoning of the foregoing cases fully applies.

The business of driving a public cab is a business devoted to public use. So held in *Munn* v. *Illinois, supra.*

The Taxicab Cases, supra, page 289;
Wolff Co. v. *Industrial Court,* 262 U. S. 522, at p. 535.

(b) The parties to the suit, namely, the Railroad Company and the Town, by their conduct over a period of ten years practically have construed the contract to empower the Town to establish a parking place on the driveway in question.

Following the completion of the improvement under the elevation contract, Mayor Todd established a parking place on the driveway at the same place where the ordinance of October 22, 1924 (R. p. 29, ll. 13 to 21), now places it, and issued instructions to the police to enforce the regulation, and it was enforced (see testimony of John Todd, R. pp. 37 to 39).

The cab stand thus created and enforced continued for some ten years and the Town regulated the traffic, including the maintenance of this parking place for public cabs, without any objection or complaint from the Railroad Company and this is admitted in Petitioner's Brief (p. 24). On the contrary, when the Town did abolish it by the ordinance of November 7, 1923, the ordinance was attacked in the name of Welsh. See *Welsh* v. *Morristown,* 98 N. J. Law, 630. It can hardly be said this action was displeasing to the Railroad Company, since its Attorney, Mr. Stallman, appeared for Welsh in that case.

The fact that for some ten years following the completion of the improvement, and until the present controversy began, a parking place for taxicabs had by regulation of the Town existed at the very place where the taxicab stand cre-

ated by the ordinance of October 22, 1924, now is, and that this existed to the knowledge of the Railroad Company, and without any objection on its part, constitutes a most important piece of conduct evidence as showing the practical construction which the parties gave to the contract.

In *Van Dyke* v. *Anderson,* 83 N. J. Eq. 568, the Court said (p. 570):

> "Whenever a dispute arises as to the meaning of a contract, that construction which the parties themselves place upon it, and as to which they deal with each other, is, as between them, the one to be adopted and to be given by the Courts."

The courts recognize as a distinct doctrine, apart from the doctrine of laches, the doctrine of conduct evidence as precluding a party from later asserting a claim.

See:

Dennis v. *Jones,* 44 N. J. Eq. 513;
Clampitt v. *Doyle,* 73 N. J. Eq. 678;
Faulkner v. *Wassmer,* 77 N. J. Eq. 537, at p. 542.

In *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358, this Court by Mr. Justice Holmes said (p. 366):

> "* * * the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic."

Conclusion.

The Circuit Court of Appeals in its opinion (R. p. 365) fully recognized the right of private property to full protection under the Constitution (R. p. 368), but it also recognized that property devoted to a public use is subject to reasonable regulation by the State under the police power (R. p. 369). It properly applied these well established rules of law to the facts of this case, and held, as succinctly stated in the 8th head note to the opinion (14 Fed. 2nd, p. 257):

> "Where railroad company by contract had authorized town to exercise necessary police powers for regulating foot and vehicular traffic at station, town was authorized to enact ordinance establishing cab stand, not only under such contract, but also by reason of fact that railroad company, by devoting its property to public use, had affected it with public interest."

The dissenting opinion by Judge Buffington overlooks two pertinent facts: (1) that notwithstanding the reservation of the fee in the land, the Railroad has opened the driveway to public use and has agreed that it shall always remain open as a driveway; and (2) that the Railroad agreed that the Town should exercise all necessary police powers in and upon the station, station grounds and driveways for the purpose of regulating the traffic, and that the ordinance was passed by the Town in the interests of the public welfare as a regulation of traffic.

We respectfully submit that for the reasons herein stated the judgment of the Circuit Court of Appeals should be sustained.

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